No. 97-5310-CSX Title: David R. Beach, et ux., Petitioners
v.
Ocwen Federal Bank

Docketed: July 23, 1997 Court: Supreme Court of Florida

Entry	Date	Proceedings and Orders
	Jul 23 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 22, 1997)
	Aug 5 1997	Application (A97-105) for a stay the mandate pending the disposition of a petition for a writ of certiorari, submitted to Justice Kennedy.
	Aug 11 1997	Response to application (A97-105) from Great Western Bank requested by Justice Kennedy, due August 15, 1997.
	Aug 15 1997	Response to application (A97-105) filed by Great Western Bank.
	Aug 22 1997	Brief of respondents Great Western Bank, et al. (PRINTED BRIEF) in opposition filed.
	Sep 2 1997	Application (A97-105) denied by Justice Kennedy.
	Sep 3 1997	(A97-105) Supplement to Application for Stay filed by David Beach, et ux.,
	Sep 3 1997	Reply brief of petitioners David Beach and Linda Beach filed.
	Sep 4 1997	DISTRIBUTED. September 29, 1997
	Sep 8 1997	(A97-105) Supplemental appendix recieved from David Beach, et ux
	Oct 6 1997	REDISTRIBUTED. October 10, 1997
	Oct 14 1997	Petition GRANTED. limited to the following question: "May an action for the statutory right of rescission provided by the Truth-in-Lending Act, 15 U.S.C. Section 1635, be revived as a defense in recoupment beyond the three-year limit on the right of rescission set forth in Section 1635(f)?" SET FOR ARGUMENT March 2, 1998. **********
	Nov 25 1997	Brief amicus curiae of American Association of Retired Persons filed.
	Nov 26 1997	Joint appendix filed.
	Nov 26 1997	Brief of petitioners David R. Beach and Linda M. Beach filed.
	Nov 28 1997	Brief amici curiae of Dorothy Botelho, et al. filed.
	Dec 19 1997	Order extending time to file brief of respondent on the merits until January 12, 1998.
	Dec 22 1997	CIRCULATED.
	Jan 6 1998	Order further extending time to file brief of respondent on the merits until January 20, 1998.
	Jan 15 1998	Record filed.
	Jan 20 1998	Brief of respondent Ocwen Federal Bank filed.
	Jan 20 1998	Brief amici curiae of Federal Home Loan Mortgage Corporation, et al. filed.
	Feb 20 1998	Reply brief of petitioners David R. Beach and Linda M. Beach (TBP) filed.

No. 97-5310-CSX

Entry	Date	Proceedings and Orders
	Feb 20 1998	Reply brief of petitioners David R. Beach, et ux. filed.
	Mar 2 1998	ARGUED.

(2)

SUPREME COURT NO.: 97-53

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Florida

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PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED FOR REVIEW

1. When a creditor violates the Federal Truth in Lending Act leading to a consumer's 15 U.S.C. §1635 extended right to rescind, can the consumer raise his statutorily created right to rescind as a defense to the creditor's foreclosure suit by recoupment after the §1635(f) 3 year limit expires as allowed by this Court, the Federal Circuit Courts and State Courts of last resort, or can the creditor escape the consequences of a §1635 rescission when he sues to foreclose the mortgage after §1635(f)'s 3 year limit expires on the theory that the right to rescind is a statutorily created right that expires after 3 years as held by Florida's Supreme Court?

PARTIES TO THE PROCEEDINGS

The Petitioners, DAVID R. BEACH and LINDA M. BEACH, his wife, are natural persons who resided in the property subject to this TIL claim, at 5870 Set N Sun Jupiter, Florida on June 22, 1981. The Beaches were Defendants in the state Circuit Court foreclosure suit, Appellants before the 4th District Court of Appeals and the Petitioners before the Florida Supreme Court. The only interested parties are those parties to this litigation and the state court as follows:

The Respondent, GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS, doing business in Palm Beach County, Florida, the Plaintiff in the state Circuit Court action, the Appellee before the 4th District Court of Appeals, and Respondent before the Florida Supreme Court.

There are no other parties to this action under FED. R. APP. PRO. 26.1 except as follows:

1. James A. Bonfiglio, attorney for Petitioners.
2. Broad and Cassel, 400 Australian Ave. S., Fifth Floor, W. Palm Beach, FL 33401, Law Firm for Respondent Great Western Bank.
3. Hon. John W. Dell, 4th District Court Judge
4. Steven Ellison, Esq., Broad and Cassel, 400 Australian Ave. S., Fifth Floor, West Palm Beach, FL, attorney for Respondent
5. Great Western Bank, Respondent/Appellee
6. Hon. Barbara Pariente, 4th District Court Judge
7. Hon. Thomas E. Sholts, Judge 15th Judicial Circuit

8. Hon. Martha C. Warner, 4th District Court Judge

9. Hon. Gerald J. Kogan, Florida Supreme Court, Chief Justice

10. Hon. Harry Lee Anstead, Florida Supreme Court, Justice

11. Hon. Stephen H. Grimes, Florida Supreme Court, Justice

12. Hon. Major B. Harding, Florida Supreme Court, Justice

13. Hon. Ben F. Overton, Florida Supreme Court, Justice

14. Hon. Leander J. Shaw, Florida Supreme Court, Justice

15. Hon. Charles T. Wells, Florida Supreme Court, Justice

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SUPREME COURT NO.:

IN THE
SUPREME COURT OF THE UNITED STATE

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

Petition for Writ of Certiorari to the Supreme Court State of Florida

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On February 13, 1997, the Florida Supreme Court for the State of Florida issued its opinion which was published at 22 Florida Law Weekly S71 (February 13, 1997) affirming the decision of the 4th District Court of Appeals, which was published at Beach v. Great Western Bank, 670 So.2d 986 (Fla. 4 DCA 1996). Petitioners attach a full copy of the opinions in the Appendix Volume I to their Petition. The Florida Supreme Court denied the Beach's timely Motion for Rehearing on April 26, 1997 and the mandate has issued.

STATEMENT OF JURISDICTION

Petitioners seek review of the February 13, 1997 opinion of the Supreme Court for the State of Florida and it's judgement made final when the Court denied the Petitioner's timely February 21, 1997 Motion for Rehearing. The judgment affirmed the 4th District Court's opinion which held §1635(f) acted as a statute of repose to bar a consumer's claim for rescission after 3 years expired when the consumer raised the claim by recoupment as a defense to the creditor's suit to foreclose its mortgage.

The Florida Supreme Court ruled on the interpretation and application of the Truth in Lending Act and had discretionary jurisdiction to review the 4th District Court of Appeal's decision that passed on and certified the question as a question of great public importance. see Art.V §3(b)(3), Fla.Const.; Fla.R.App.Pro. 9.030(a)(2)(A)(v). This Court has jurisdiction under 28 U.S.C. 1254(1) and Rule 10(b) Rules of the Supreme Court.

PREFACE-ABBREVIATIONS USED

Petitioners will use the following abbreviations in the brief;

TIL ..... 15 U.S.C. 1601, et.seq., Federal Truth In Lending Act

§1601 ..... Specific section of 15 U.S.C. 1601, et.seq.,

TIL ..... Pre-1980 15 U.S.C. 1601, et seq.

new TIL ..... TILA after the Simplification and Reform Act of 1980

FRB ..... The Federal Reserve Board

Reg Z ..... 12 C.F.R. 226.01,

O.S.C ..... Official Staff Commentary to Reg. Z issued by the FRB

APR ..... Annual Percentage Rate of Interest under 15 U.S.C. 1606 & 1638(a)(4)

FC ..... Finance Charge under 15 U.S.C.1605 & 1638(a)(3)

AF ..... Amount Financed under 15 U.S.C.1638(a)(2)(A)

IAF ..... Itemization of Amount Financed under 15 U.S.C.1638 (a)(2)(B)

Petitioner will refer to DAVID R. BEACH and LINDA M. BEACH, his wife, Petitioners, as "the Beaches" and GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS, as "GW".

STATUTE INVOLVED

§ 1635. Right of rescission as to certain transactions

(a) **Disclosure of obligor's right to rescind**

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) **Return of money or property following rescission**

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such

interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) **Rebuttable presumption of delivery of required disclosures**

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) **Modification and waiver of rights**

The Board may, if it finds that such action is necessary in order

to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) **Exempted transactions; reapplication of provisions**

This section does not apply to--

(1) a residential mortgage transaction as defined in section 1602(w) of this title;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(f) **Time limit for exercise of right**

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the

provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

STATEMENT OF FACTS AND CASE

The Beaches owed a vacant lot at 5870 Set N Sun Jupiter, Fla. On June 22, 1981 they built a home with a Fidelity construction loan then refinanced Fidelity's loan through GW. The Beaches closed on the GW refinance on August 15, 1986. GW furnished the Beaches with closing documents including a 3 day notice of right to cancel and TIL disclosure statement that contained material errors which gave the Beaches the extended right to rescind under §1635 and the right to damages under §1640(a).

GW sued to foreclose the mortgage more than 3 years from the 1986 closing. The Beaches answered and raised TIL §1635 rescission and §1640(a) damages as an affirmative defense. The matter went to trial and resulted in a finding that GW made material disclosure errors; the loan was not subject to §1635 rescission; and even if rescission was appropriate, the §1635(f) limit expired.

Florida's Fourth District Court of Appeal in a divided opinion held the Beach's loan was subject to rescission, but the Beaches could not rescind to defend GW's foreclosure after the §1635(f) 3 year limit expired. The panel certified the question to the Florida Supreme Court. Florida's Supreme Court affirmed finding §1635(f)'s 3 year limit for rescission a statute of repose which barred the Beach's defense in recoupment after the 3 year limit expired.

The Petitioners now seek Certiorari Review.

SUMMARY OF ARGUMENT

Florida's Supreme Court is the only state or federal appellate court to refuse to allow a consumer to raise the extended right to rescind as a defense in recoupment after the §1635(f) 3 year limit expires. The unanimous state appellate opinions allow time barred rescission as a defense in recoupment under §1635(f). This Court and the Federal Circuit Courts unanimously agree that a defendant can raise all federal statutory claims, including TIL claims, after the limit expires as a defense in recoupment.

The decision directly and expressly conflicts with the long standing and unanimous opinions from this Court, other Circuit Courts and the highest appellate courts of other states that refuse to distinguish between a common law and a statutory federal cause of action for defensive recoupment after the statute of limitation to bring the claim expires.

This Court should accept jurisdiction to create harmony with this Court's decisions, the Federal Circuits and state appellate Courts on the subject.

REASONS FOR GRANTING THE WRIT

Congress passed TILA to remedy divergent and often fraudulent practices in disclosing the true cost of consumer credit, assure a meaningful disclosure of credit terms, facilitate comparison credit shopping and balance the lending scales, thought to be weighted in favor of lenders. §1601(a), H.R.Rep.No.1040, 90th Cong. 2d Sess. 7,13 (1968), Mourning v. Family Publications Services Inc., 93 S.Ct. 1652,1657-1660, 411 U.S.356, 363-368, 36 L.Ed.2d 318 (1973), Ford Motor Credit Co. v. Milhollin, 100 S.Ct. 790,794, 444 U.S. 555,559-560, 63 L.Ed.2d 22 (1980), Anderson Bros. Ford v. Valencia, 101 S.Ct. 2266,2274, 452 U.S. 205,219-220, 68 L.Ed.2d 783 (1981).

Congress created a private attorney generals system to enforce TIL by giving consumers the right to damages for TIL errors and right to rescind certain loans regardless of the technical nature of the error. §1640(a), §1635(a)&(b), Sosa v. Fite, 498 F.2d 114, 121 (5th Cir. 1974), Williams v. Public Finance Co., 598 F.2d 349, 355-358,fn.9 (5th Cir.1979), Parker v. DeKalb Chrysler Plymouth, 673 F.2d 1178,1181 (11th Cir.1982).

Courts expansively and broadly apply and interpret the §1635 right to rescind because it is remedial while narrowly interpreting exceptions to the right. Sellers v. Wollman, 510 F.2d 119,122 (5th Cir.1975), Buford v. American Fin. Co., 333 F.Supp. 1243,1247 (N.D. Ga.1971), Equity Plus Consumer Fin. & Mtge. Co. v. Howes, 861 P.2d 214,217 (1993), In Re Celona, 90 B.R. 104,112 (Bkr. E.D.Pa.1988), aff'd 98 B.R. 705 (D.C. E.D.Pa. 1990).

Reiter v. Cooper, 113 S.Ct 1213,1218 507 U.S. 258, 122 L.Ed2

604(1993) affirmed the Court's long standing principal announced in Bull v. United States, 295 U.S. 247,262 55 S.Ct. 695,700 79 L.Ed. 1421 (1935) and again in United States v. Western Pacific R. Co., 352 U.S.59,71 77 S.Ct.161,169, 1 L.Ed.2d 126 (1956): recoupment is available in the context of all federally created rights including TIL. Reiter embraced recoupment for TIL by citing In Re Smith, 737 F.2d 1549,1554 (11th Cir.1984), a TIL case where recoupment would be available had the consumer brought a proper recoupment claim.

Florida's Supreme Court distinguished the unanimous opinions from other states that allowed post 3 year §1635 claims as defenses in recoupment by holding the 5 other cases and 15 judges wrongly assumed Congress created §1635(f)[1974]'s 3 years as a statute of limitation not a statute of repose. Beach 22 Fla.L.WK. S71,72 fn 7 (Fla.1997) refused to follow Dawe v. Merchant's Mortgage & Trust Corp., 683 P.2d 796 (Colo. 1984)-5 justices, Federal Deposit Ins. Corp. v Ablin, 532 N.E. 2d 379 (Ill.App.Ct.1988)-3 judge panel, Community National Bank & Trust Company v. McClammy 525 N.Y. S.2d 629 (N.Y.App.Div. 1988)-4 judge panel, In Re Shaw, 178 B.R.380 (Bkr.N.J. 1994) & In Re Botelho, 195 B.R. 558 (Bkr.Mass.1996)-1 judge each [The district judge recently affirmed Botelho in an unreported opinion].

Beach adopted the Federal definition for a statute of repose, identical to Florida under WRH Mortgage, Inc. v. Butler, 684 So.2d 325,327 (Fla. 5 DCA 1997):

> "A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the

> commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created and the limitation of the remedy is a limitation of the right." Beach p. 73.

Beach's analysis of §1635(f) as a statute that creates and limits rights which did not exist at common law like a statute of repose conflicts with unanimous Federal Circuit opinions embodied by James v. Home Const. Co. of Mobile Inc., 621 F.2d 727,728 (5th Cir. 1980). Beach conflicts with James's holding that §1635(f) was a statute of limitations not a statute that limited a substantive statutorily created right. James rejects this Beach holding in scathing language:

> "We see no reason to continue to abide by obsolete judicial dicta which have little relevancy to contemporary thought."

James adopted this Court's principals announced in Bull, and Western Pacific, re-affirmed in Reiter. All refuse to distinguish between a statute of limitation and statute of repose for defensive recoupment. No common law right existed to collect tax refunds, the issue in Bull p. 700. This Court refused to distinguish the right to the refund based on the statutorily created right/statute of repose doctrine Id., p.700:

> "An action will lie whenever the defendant has received money which is the property of the plaintiff and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness is immaterial....A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction."Id.

No right to recover damages under 49 U.S.C. §10701(a) for the difference between a tariff rate and the reasonable rate existed at

common law for Reiter. Under §11706(c)(2) shippers must begin the §11705(b)(3) action within two years of delivery by the carrier. §11706(g). Congress statutorily created a right which did not exist at common law and placed a 2 year limit to recover. Id. 1217-1218. Beach would reject Reiter's defensive claims because the claims meet the statute of repose definition under both Federal and State law. Beach conflicts with Reiter's holding that a Plaintiff cannot wait for a time limit to run then sue to avoid the time barred claim that would offset the debt, even if the claim is created by statute. Id. p.1218. This Court adopted the Beach rejected concept of defensive rescission past §1635(f)'s 3 years in Reiter:

> "Courts of Appeals have understood [United States v. Western Pacific R. Co., 352 U.S.59, 71, 77 S.Ct. 161,169 (1956)] as expressing not just a narrow holding based on the United States set-off statute, but a general principal of recoupment applicable in other contexts. See Distribution Services Ltd. v. Eddie Parker Interests, Inc., 897 F.2d 811,813 (CA5 1990); in re Smith, 737 F.2d 1549, 1554 (CA11 1984); 118 East 60th Owners Inc. v. Bonner Properties, Inc., 677 F.2d 200,203 (CA 1982); Luckenbach S.S. Co. v. United States, 312 F.2d 545, 549, n.3 (CA2 1963). Id. p. 1218.

Beach conflicts with Matter of Coxson 43 F.3d 189,193-194 (5th Cir. 1995) and In Re Smith, p.1554, both TIL cases. Beach conflicts with Distribution Services Ltd. v. Eddie Parker Ints. Inc., 897 F.2d 811,812 (5th Cir.1990) which allowed a COGSA claim defensively after 46 U.S.C.1303(6)'s limitation expired. Eddie Parker, p.813-814 rejected the cases that held COGSA's time limit extinguishes the action itself not the remedy, an express conflict with Beach's repose reasoning. COGSA's limitation meets Beach's Federal and State definitions for a statute of repose. Beach presents direct conflict with Coxson, In Re Smith and Eddie Parker.

Beach conflicts with Silverman v. Eastrich Multiple Investor Fund L.P., 51 F.3d 28,31-33 (3rd Cir.1995). The 3rd Circuit allowed a defendant to raise his ECOA claim after the limit expired, even though ECOA claims never existed at common law, are rights created wholly by statute and meet the Beach state and federal definition for a statute of repose. Beach conflicts with: Crossett Lumber Co. v. United States, 87 F.2d 930 (8th Cir.1937) [recoupment of tax refund allowed after the limit expired even though right to tax refund statutorily created right that did not exist at common law]; Pennsylvania R.Co. v Miller 124 F.2d 160 (5th Cir.1942) [recoupment of refund for damage to shipped goods under ICC allowed after the limit expired although right to damages statutorily created right that did not exist at common law]; Luckenbach S.S. Co. v. United States, 312 F.2d 545,549 n.3 (2nd Cir.1963) [recoupment allowed for 46 U.S.C.§745 Federal Admiralty Suit after the limit expired though the right did not exist at common law]; 118 East 60th Owners Inc. v. Bonner Properties, Inc., 677 F.2d 200,203 (CA 1982) [recoupment allowed under Federal Declaratory Relief Act, although right to declaratory relief did not exist at common law].

Reiter embraced James and Bull, repudiating Beach's holding that defendants cannot raise a repose-barred claim as a defense. Reiter refused to distinguish between statutorily created Federal rights and common law rights for post limit defensive recoupment. Federal tax laws, federal tariffs, ICC bills of lading and COGSA claims all meet the Beach statute of repose definition. Congress created a new liability for taxes, tariffs, ICC bills of lading and

COGSA claims, gave parties actions to enforce the rights unknown at common law and fixed the time to bring the actions. IRS tax laws, the right to recover tariffs, ICC bills of lading, and COGSA claims are all creations of statute unknown at common law. Commencement of a tax, tariff, ICC, and COGSA action within the time fixed in the statute is an indispensable condition of liability and the action which it permits. The time element for a tax refund, tariffs, ICC bills of lading, and COGSA suits are inherent elements of the right so created and the limit on the remedy is a limit of each right.

Reiter rejects Beach's holding that would allow a Plaintiff to wait for the tax, tariff, ICC bills of lading, or COGSA statutes of repose to run, then sue to avoid the compulsory counter claim that would offset the debt. Reiter, p.1218 embraced defensive post-limit §1635 rescission by adopting in re Smith in the broader rule for federal claims. Four U.S. Supreme Court principles emerge from Bull and Reiter that Beach rejected: 1) Federal defensive recoupment is not as narrow as Beach, but is extremely broad to cover statutes of limitation and repose; 2) Reiter p.1218 adopted recoupment for all statutes of repose including Smith's application of recoupment for TIL; 3) Reiter adopted Smith after Congress amended §1640(e) and so rejected Beach's statutory interpretation of §1640(e) as compared to §1635(f) for Federal Law; and, 4) Reiter by adopting Smith after Congress amended §1640(e), embraced Smith's 3 prong test for TIL claims after §1635's 3 years expires.

Beach's statute of repose holding conflicts with every federal case to analyze whether defendants can raise statutorily created

federal rights after the limit expires regardless of whether the federal statute meets the definition of a statute of repose. Not one case from Bull to Reiter to 118 East 60th distinguishes between statutory created federal rights, statutes of repose or rights at common law for recoupment.

All 3 prongs of Smith's p. 1552 test, adopted in Reiter, apply to a foreclosure and a §1635 defense: 1) the TIL violation and the debt arose from the same loan transaction; 2) the defendant asserts the §1635 claim as a defense; 3) the creditor's claim is timely. Federal Law from Bull to Reiter conflict with Beach's artificial distinction between statutorily created Federal rights terminated by repose and common law rights. Federal Law allows time barred recoupment even though all of the time barred Federal claims meet Beach's definition of a statute of repose. Beach conflicts with this Court and unanimous Federal Circuit Court opinions that allow time barred Federal Statutory claims by recoupment after a limit expires regardless of whether a statute of repose or limitation bars the claim, including §1635(f).

Beach also conflicts with the unanimous state court opinions on the subject. Dawe is the first state Supreme Court reported opinion to allow rescission after §1635(f)'s limit expired. Ablin, McClammy, Westbank v. Maurer 658 N.E.2d 1381 (App.Ill.1995), Shaw and Botelho all adopted Dawe. The state opinions unanimously allow post limit TIL rescission. Beach conflicts with the reported opinions from the highest state court in Colorado and intermediate appellate opinions from New York and Illinois.

Beach held Congress' §1635(f) particular language made it a statute of repose. Beach, [and likely GW in its argument] overlooks the fact every federal and state case which adopts the statutorily created right or statute of repose doctrine does so in the context of an affirmative suit to recover on the time barred claim. see Eddie Parker p.813-814. Beach is the only case to apply the repose doctrine to bar the claims defensively by recoupment.

Every case analyzes §1635(f) as a statute of limitation not a statute of repose. Beach's portrayal of §1635(f) as a statute of repose conflicts with James p.728-729. Even the opinions that bar post-3 year affirmative suits call §1635(f) a statute of limitation not a statute of repose, creating conflict between Beach and more Federal Circuit cases: King v. State of Cal. 784 F.2d 910,914 (9th Cir.1986) [Congress did not intend to prolong limitations period]; Rudisell v. Fifth Third Bank, 622 F.2d 243,246-248 (6th Cir.1980), Moore v. Travelers Ins. Co., 784 F.2d 632,633 (5th Cir.1986), Felt v. Fed. Land Bank Ass'n, 760 F.2d 209,210 (8th Cir.1985).

Beach ignored the fact that the Beaches did not sue or bring an action to enforce the right to rescind while repose bars the action, not the defense. Beach's statute of repose definition does not apply to a defendant because the defendant does not bring a cause of action when he alleges recoupment. The lack of a cause of action is the critical and missing component for Beach's recoupment analysis under state and federal statute of repose definitions.

A defense is not an action. **Black's Law Dictionary**, 6th Ed.: p.28 Action; "in its usual legal sense means a lawsuit brought in

a court": p.419 Defense; that which is offered and alleged by the party preceded against in an action or suit as a reason in law or fact why the Plaintiff should not recover or establish what he seeks". The defendant did not bring an action or sue to rescind.

§1635(f) may fix the time to raise §1635 as an action but the Defendant's right of recoupment is not an action. §1635(f)'s 3 years cannot be an indispensable condition of rescission liability and the rescission action according to this Court's definition of recoupment. §1635(f) fixes 3 years for an action so a defense by recoupment does not meet the definition of a statute of repose.

Beach relied on an incomplete legislative history of §1635(f) in 1980 compared to §1640(e) thereby creating conflict with another line of Federal opinions. This Court's statutory construction rules for a particular statutory provision requires examination of the whole statute's legislative history, its design as a whole and its object and policy. Helvering v. New York Trust, 54 S.Ct. 806,808-809, 292 U.S. 455, 78 L.Ed. 1361(1934), Crandon v. U.S. 110 S.Ct. 997, 494 U.S. 152, 108 L.Ed2. 132(1992). Beach examined §1635(f) and §1640(e) in 1980, ignoring their history from 1968 to 1995, and so conflicts with Helvering and Crandon.

Beach ignored the complete history of §1635(f) and the purpose of the 1974 Act, citing Russello v. United States 104 S.Ct. 296, 464 U.S.16, 78 L.Ed2 17 (1983) to hold when Congress puts language in one section of a statute and omits it from another section it is generally presumed Congress acts intentionally. Russello p.299 interpreted 18 U.S.C.1962 & 1963 [RICO]. Congress passed RICO as a

comprehensive statute in 1970 and did not amend either sections by 1983 when this Court wrote Russello. Since Congress did not amend the sections before Russello, the general presumption had validity for interpreting RICO at one point in time.

Beach's general presumption holding has no basis for §1635(f) and §1640(e) because Congress passed §1640[1968] with no recoupment and a 1 year limit and §1635[1968] with no limit. Congress amended each section piecemeal at different times to correct different problems, making Russello inapposite. This Court does not look at one section of a statute in one point of time to presume Congress' intent under TIL's circumstances. This Court examines the history and purpose of each section as a whole to glean Congress' intent. Beach conflicts with Helvering, and Crandon when it relies on Russello to interpret §1635(f) and §1640(e) based on 1980 only.

The complete legislative history from 1968 supports post-limit recoupment. Beach only looked at 1980 §1635(f) because Beach could not justify its opinion based on the complete history of §1635(f) and §1640(e) from 1968 to 1995. Comparing §1635(f) to §1640(e) based only on 1980 and concluding Congress limited the right to rescind to 3 years as held by Beach is like reading Shakespeare's Romeo and Juliet Act IV Scene V and concluding Juliet died from poisoning.

Congress imposed a 1 year limit for damages in §1640(e)[1968]. and did not expressly allow post-limit damages. §1635[1968] had no time limit and so did not need a post-limit recoupment provision. Since Congress originally passed an unlimited right to rescind in

1968, Congress examined and accepted the results of rescission on a creditor after 3 years in 1968. Congress allowed consumers to rescind on default after 359 payments on a 360 month mortgage and note despite the result to the creditor or the potential for a consumer to remit 359 payments, then strategically default.

Congress passed the first TILA amendment to rescission in 1974 to deal with Sosa, and similar cases that allowed rescission after a sale because the Sosa cases created title problems. A §1635(b) rescission reordered common law rescission when it returned the parties to the status quo. The creditor cancels the mortgage and returns charges to the consumer. The consumer then returns the principal. Williams v. Homestake Mortgage Co., 968 F.2d 1137,1140-1142 (11th Cir.1992). The parties can never return to the status quo, especially if a consumer refinances the old debt with the same lender and then the consumer sells the home, see for example In Re Porter 961 F.2d 1066 (3rd Cir.1992). The status quo requires the creditor to get his old mortgage back, an impossibility if the consumer sold the home to a new buyer who put a new mortgage on the same property.

Responding to a now obvious title problem, 2 Congressional reports recommended a limit on rescission for the sole purpose to clear property title. The January 3, 1972 Annual Report to Congress on TIL by the Board of Governors of the Federal Reserve System, and December 1972 Report of the National Commission on Consumer Finance proposed the rescission limit not to deal with the monetary result of rescission on lenders after 29 years 11 months nor to deal with

strategically defaulting consumers. Both were concerned only with title clouds after a sale. Neither report nor Congress cited any concern cited by Beach to justify an absolute 3 year limit: avoid a strategic default and the results on creditors. Congress passed the 3 year limit for the sole purpose to clear title to property:

> "As a result, the titles to many residential real estate properties may become clouded by uncertainty regarding these rights of rescission. The Board recommends that Congress amend the Act to provide a limitation on the time the right of rescission may run." January 3, 1972 Annual Report to Congress on TILA by the Board of Governors of the Federal Reserve System, p.19.
>
> "The FRB pointed out in two previous reports that the rescission period runs indefinitely unless required disclosures have been made and notice of rescission provided. This clouds the title to many residential properties and injures consumers in the long run. **The Commission supports the recommendation of the Board of Governors of the Federal Reserve System that Congress amend the [TILA] to limit the time the right of rescission may run where the creditor has failed to give proper disclosures.** The period recommended by the FRB (three years or until the property is sold, whichever is shorter) appears reasonable." December 1972 Report of the National Commission on Consumer Finance, p. 189-190.

Since Congress passed the 3 year rescission limit to prevent title clouds, permitting defensive rescission after 3 years when the consumer still has title is consistent with TIL's purposes in general, rescission in particular, and the 1974 amendment; when the consumer still owns title, no title cloud exists for post 3 year rescission. Rescission can still protect consumers and return the parties to the status quo before the lien consistent with TILA and rescission's stated purpose. Beach's treatment of §1635(f)[1974] as a statue of repose is inconsistent with its history.

Beach's holding that TIL rescission is a penalty and not an equitable right to remedy wrong disclosure conflicts with Williams,

p.1140, which points out Congress adopted but reordered common law rescission to remedy wrong disclosure. Williams p.1140-1142 cited TIL cases that equitably apply §1635 and held New TIL adopted TILA rescission as an equitable remedy not a penalty. see also FDIC v Hughes Development, 684 F.Supp. 616, 622-623 (D.Minn. 1988).

TILA rescission as an equitable remedy, and not a penalty is consistent with the purpose of disclosure. Porter p.1074 states TIL rescission gives consumers time outside closing to weigh the credit terms and think about risking their homes to foreclosure based on the terms disclosed. It is equitable to rescind when creditors give wrong disclosures. Consumers could not evaluate whether to expose their homes to foreclosure and loss based on the correct terms because the creditor never gave them the correct terms. Conversely, creditors should not have a loan secured by a mortgage and force the consumer to pay or lose his home based on terms the consumer did not know or agree to when the creditor violated TIL with wrong and inaccurate disclosure of the loan's terms or the right to rescind before closing on the loan.

It is even more equitable to allow consumers to rescind in light of the TILA rescission remedy, especially when the consumer still has title. TILA rescission returns the parties to the status quo before the closing occurs. The consumer gets back his costs and the creditor gets back his principal. Consumers are not saddled with a mortgage and credit terms that he never agreed to. They can renew their credit search to find the best terms available. Even though the creditor cannot collect any charges from the consumers,

creditors will still get back the original principal despite TIL errors. Creditors suffer adverse consequences only if they wrongly refuse to timely rescind.

§1635 rescission after 3 years is consistent with Congress' express purpose and equitable for both parties, especially when the consumer is faced with a foreclosure and the lose of his home: 1.) The consumer will not lose his home based on terms the consumer thought he had, but did not, because the creditor never clearly and conspicuously disclosed the correct terms under TILA; 2.) Consumers get back only the charges imposed by the creditor; 3.) Creditors get back all the principal originally lent to the consumer; 4.) The creditor will be encouraged to discontinue his loan practices that led to the extended right to rescind. Porter,p.1074 Williams,1140-1142, Hughes,p.622-623, Dawe, and Reiter.

Beach ignored the legislative history of §1640(e). Congress overruled as wrongly decided the Devlin v. Aetna Finance Co. 379 So.2d 972 (Fla. 5 DCA 1979),cert.den.389 So.2d 1108 (Fla.1980) line of cases that refused to allow recoupment for damages. §1640(e)'s 1980 amendment allowed post-limit §1640 damages defensively and rejected the statutory right/statute of repose reasoning that the Devlin cases used to bar damages after 1 year. Congress disclaimed any intent to adopt the statutory right/statute of repose doctrine for TIL cases in 1980.

The courts that originally disallowed post-limit §1640 damages used Beach's analysis based on the artificial distinction between a common law right, a statute of limitation and a statute creating

a new substantive right, [the "statutorily created right" doctrine rejected by James]. see for example Ken Lu Enterprises v. Neal, 223 S.E.2d 831,833-835 (App.N. C.1976),cert.den. 225 S.E.2d 829 (N.C. 1976), cert.den.97 S.Ct. 533, 429 U.S. 1002(1976), Heulett v. John Blue, 344 So.2d 505,507-508 (App.Ala.1976), Public Loan v. Hyde, 390 N.Y.S. 2d 971, 973-974 (1977), Devlin.

Devlin, p.973, noted the split and followed the cases that did not allow defensive time barred damage claims. Congress adopted the cases allowing post-limit defensive damages that James and the Dawe cases adopted and rejected Devlin. Congress disapproved of Devlin and the statutory right/statute of repose doctrine for TIL in 1980 and therefore disapproved of Beach's opinion.

The history of §1640(e) as amended in 1980 shows Congress did not address defensive damage claims in 1974. The 2 1974 reports to Congress and 1974 Congress did not address post-limit damages because no post-limit damage cases existed in 1974. Congress did not need to fix a TIL problem that did not exist in 1974. Congress adopted the reports at §1635(f) in 1974 only to prevent clouds on title as a technical adjustment to the 1968 Act. see James,p.729.

§1640(e) had no recoupment provision and the case law split after 1974 over whether damages were a right created by statute and ended when the statute expired, or survived by recoupment. Congress dealt with the split by rejecting the Devlin cases and allowing defensive damage claims in 1980, thus adopting James and killing Beach's statutorily created right doctrine for TILA. Congress did not address defensive rescission in 1980, but Beach overlooked the

fact Congress did not need to add post limit defensive rescission in 1980, just as they had no need to add the right to defensive damages in 1974: no split of cases in 1974 or 1980 existed when Congress amended the statute.

Congress did not show an intent to bar post-limit defensive rescission in 1980. Congress treated post-limit rescission in 1980 in the same way they treated post-limit damages in 1974. Congress simply did not address a non-existent problem. Congress did not need to resolve a split of authority on damages in 1974 when they added §1635(f) and did not need to resolve a split of authority on rescission in 1980 when they added §1640(e) to allow post-limit damages defensively. see Ablin. Beach overlooked this legislative history, then borrowed the reasoning James and Congress rejected, using the now completely discredited statutorily created right statute of repose doctrine to support its opinion.

Congress reconciled the statutorily created right doctrine for §1640(e) damage cases by rejecting Devlin and allowing not barring claims in 1980. James rejected the same creditor attempts to apply the Devlin cases to rescission. Smith in 1984, Dawe p.800 in 1984 and Ablin in 1988 p.381-382 looked at the same pre-1980 1640(e) damage cases Devlin p.973 cited. All rejected Devlin, and used the reasoning in the cases Congress approved of in 1980 when it passed §1640(e) and rejected Devlin.

Reiter, p.1218, Smith p.1553, and Coxson p.193-194 all reject the statutorily created right/statute of repose doctrine as dead. James in 1980, Smith and Dawe in 1984, and Ablin in 1988 looked at

the pre-1980 damage cases and correctly reasoned Congress killed the doctrine in 1980 for TIL cases. James, Smith and the Dawe cases embraced the opinions Congress embraced in 1980 when Congress ended all debate on the subject by rejecting the statutory created right and statute of repose doctrine that Beach has now resurrected.

Beach thought rescission inequitable after 3 years, holding it is unfair to allow a strategic default, offset principal by past collected interest, loss of post-default accrued interest, and pay the consumer's costs and fees. The holding has a number of flaws, notwithstanding the fact that Rudisell, p.248 already considered and rejected a similar creditor argument, presenting yet another Federal Circuit opinion in conflict with Beach.

The legislative history of §1635 shows Congress did not worry about the monetary result of a post 3 year rescission on a creditor by strategic default when they passed §1635 in 1968 and cited no such concern over strategic defaults when they passed §1635(f). The 3 years in 1974 only protected title clouds, not creditors from the monetary results of rescission after 3 years. 1968 Congress already approved post 3 year rescission despite the potential for strategic defaults and the result on a creditor and approved the result again in 1974 as long as the result would not pose a title problem.

Beach's expressed concern over consumers who may strategically default after 3 years has no basis in the legislative history. If Congress had such a concern, it could have created protection from an intentionally defaulting consumer. Congress could easily create a rescission exception to protect creditors from strategic defaults

but did not do so. Beach p.73 holds it is presumed Congress acted intentionally to omit any creditor protection from consumers who strategically default after 3 years.

GW may argue Congress did not need to protect lenders from a strategic default because it did not allow §1635(f) after 3 years. However, a consumer could strategically default before 3 years by remitting 35 payments, sending out a notice to rescind, and then defaulting. Congress did not protect creditors from intentional defaults and so declined to protect creditors from Beach's fear of strategic intentional defaults.

Dawe balanced the equities for consumers and ruled Congress wants a consumer to defend foreclosure by rescission rather than encourage creditors to avoid TILA liability by waiting more than 3 years to sue. Allowing creditors to profit from TILA errors because 3 years passed would not further TIL's purposes. The Dawe cases and Reiter cases reject Beach's concern for consumer windfalls when a consumer in default can rescind strategically after many years. The Dawe cases articulated Congress' concern: inequity to consumers not creditors and furthering Congress' purpose to protect consumers. Given TILA's remedial purpose, equities protect consumers from foreclosure based on wrong terms rather than protect creditors from TILA errors after 3 years.

Creditors protect themselves by giving accurate disclosures and putting in place procedures to catch and correct errors as required by §1640(c). Creditors protect themselves when they discover errors after closing by informing consumers of the error,

giving corrected disclosures and adjusting the account under §1640(b). Liability under §1635 after 3 years furthers Congress' purpose to encourage accurate disclosure and protect consumers by forcing creditors to: give correct initial disclosures; set up §1640(c) procedures to catch and correct errors; examine loans post-closing for accurate disclosure; follow §1640(b) after finding violations. This furthers compliance, allows consumers to make informed credit decisions and protects consumers. Shielding creditors from liability frustrates TIL's purpose and encourages creditors to avoid correcting errors under §1640(b) by holding mortgages in default past 3 years then suing to foreclose.

Beach could not dispute this legislative history of rescission and damages through 1974. Allowing post 3 year rescission furthers Congress' purpose to protect consumers, encourage creditors to give accurate disclosure, establish §1640(c) procedures to examine loans for accurate TIL disclosures, and implement a procedure to follow §1640(b) after finding violations, fostering compliance, informed consumer credit decisions, and ultimately protecting consumers.

Shielding creditors after 3 years frustrates TIL's purpose, and encourages creditors to avoid correcting errors under §1640(b) after finding errors by holding loans for 3 years, then suing on default. Creditors will advertise deceptively low APRs and FCs. Consumers will borrow from violative creditors who understate APRs and FCs. Creditors will have no incentive to establish procedures to correct errors under §1640(c). Compliant creditors could not compete with non-compliant creditors because his loan would be more

expensive, leading to TIL misdisclosure, misinformation about true costs of credit and frustrating TILA's stated purpose. see Dawe, Ablin, McClammey.

Beach encourages lenders to close their eyes to post-closing errors and violate §1640(b). A lawyer who properly represents the creditor and reviews a defaulted loan for foreclosure in month 32 will examine the loan for a TIL defense. When the lawyer discovers a rescission error and advises the creditor to follow §1640(b) the creditor will ask what happens if he complies with TIL. The lawyer must tell the creditor the consumer will probably rescind the loan when the creditor adjusts his account and sends the corrected TIL disclosure statement and new right to rescind. see §1640(b), In Re Underwood, 66 B.R. 656,662-663 (Bkr. W.D. Va. 1986).

When the creditor asks what happens if he does not comply with §1640(b) or does not foreclose the lawyer would have to advise the creditor that if he did not comply with §1640(b) and did not file a foreclosure until month 37, the consumer could never rescind. Virtually no lender with a TIL violative loan will sue to foreclose until after 36 months to take advantage of Beach and avoid a §1635 rescission, eviscerating §1640(b) and the §1635 right to rescind.

Beach encourages creditors to grossly understate FC's and APRs because they can close more loans and avoid rescission. Consumers who received DSs with grossly understated finance charges would borrow from violative creditors who seemingly offer lower costs of credit. The consumer who closes then finds he could not afford to pay the loan and defaults will find the violative creditor will not

foreclose right away. The consumer will not need to find a lawyer to defend an unfiled foreclosure and will likely never find out about the right to rescind until after 3 years runs.

The violative creditor will hold the defaulted loan until more than 3 years from closing to avoid the consequences of §§1635 and 1640(b), then sue to rescind, avoiding a valid TIL rescission and the consequences of TIL violations. Compliant creditors could not compete with non-compliant creditors because compliant creditors would seem to offer more expensive loans. Beach encourages TIL violations, misinformation about true costs of credit, and ultimately frustrates TILA's stated purpose. This is why the Court must grant certiorari.

CONCLUSION

The Beaches respectfully submit Certiorari should be granted to resolve the express and direct conflict between the Florida Supreme Court's decision that pays homage to the statutory created right and statute of repose doctrine for recoupment. When creditors violate the Federal Truth in Lending Act leading to a consumer's 15 U.S.C. §1635 extended right to rescind, this Court should treat the federally created right identical to all other federally created rights. The defendant can raise his statutorily created right as a defense to the suit by recoupment after the §1635(f) 3 year limit expires as allowed by this Court, the Federal Circuit Courts and State Courts of last resort. This Court should affirm its long standing rule that refuses to reward Plaintiffs and make them responsible for the consequences of their wrongdoing by allowing defendants to defend by time barred claims, and put to an end the statutorily created right, statute of repose, statute of limitation dichotomy for federal claims.

Respectfully Submitted,

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EDITOR'S NOTE

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SUPREME COURT NO.: 97-5310

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

APPENDIX TO

Petition for Writ of Certiorari to the Supreme Court of the State of Florida

DOCUMENTS REQUIRED UNDER RULE 14.1(i)

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SUPREME COURT NO.:

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1. Final Judgment of Foreclosure
2. Opinion of 4th District Court of Appeal with Mandate
3. Opinion of Florida Supreme Court with Mandate

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IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and LINDA M. BEACH, his wife,

Defendants.

---/

FINAL JUDGMENT OF FORECLOSURE

THIS MATTER came before the court for trial without a jury on October 20, 1993. After the presentation of testimony, review of the documentary evidence, hearing argument of counsel and being duly advised in the premises, the court makes the following findings of fact:

1. On December 4, 1985, DAVID AND LINDA BEACH (the "BEACHES"), closed on a construction loan with Fidelity Federal Savings Bank of Florida.

2. The funds were to be used to build a home on a vacant lot they had purchased in Jupiter on June 22, 1981.

3. On August 15, 1986, the BEACHES entered into a consumer credit transaction with GREAT WESTERN BANK ("GREAT WESTERN") in order to satisfy the construction loan from Fidelity Federal and to provide permanent financing for the acquisition of their home.

4. The BEACHES received numerous documents at closing, including a Federal Truth-in-Lending Act ("TILA") Disclosure Statement, a Closing Statement, a Three Day Notice of Right to Cancel, a VRM II T-Bill Rate Disclosure Statement, a Special VRM Notice, an Itemization of Amount Financed, a Good Faith Estimate of the Itemization of the Amount Financed, a Good Faith Estimate of the Truth-in-Lending Disclosure Statement and other disclosure documents.

5. Due to the variable rate feature of the note, GREAT WESTERN changed the interest rate on a yearly basis.

6. On December 1, 1991, the BEACHES defaulted on the loan by failing to make payment on the note.

7. Previously, the BEACHES had made $52,376.71 in payments and late charges to GREAT WESTERN.

8. The parties have stipulated that as of October 20, 1993, the BEACHES owe GREAT WESTERN $116,801.77.

9. GREAT WESTERN initiated foreclosure proceedings and the BEACHES asserted, as an affirmative defense, that GREAT WESTERN violated TILA.

10. The Notice of Right to Cancel form given to the BEACHES was the incorrect form.

11. The distribution of the wrong form to the BEACHES was the result of an unintentional bona fide error which did not constitute an error of legal judgment with respect to Plaintiff's obligations under the Truth-in-Lending Act.

12. In accordance with the testimony of Cindy Newman, Plaintiff maintained procedures reasonably adapted to avoid the distribution of incorrect rescission forms.

13. The BEACHES did not seek to rescind the GREAT WESTERN mortgage until after the institution of this foreclosure action.

ISSUES PRESENTED

A. Whether GREAT WESTERN has violated the Truth-in-Lending Act by failing to make the proper disclosures to the BEACHES when they consummated the August 15, 1986 loan.

B. What remedies are available to the BEACHES for any violations of the Federal Truth-in-Lending Act?

LEGAL ANALYSIS

A. Whether GREAT WESTERN Violated TILA by Failing to Make the Proper Disclosures to the BEACHES When They Consummated the August 15, 1986 Loan?

(1) More Conspicuous Rule.

15 U.S.C. §1632(a) provides as follows: "The terms annual percentage rate and finance charge shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction, except information relating to the identity of the creditor." The BEACHES allege that GREAT WESTERN violated this subsection because it "used the same or smaller print size, style type and boldness for APR and FC as it did for "your initial contract rate is", "means estimate" and other typed in language." Although the print size, style type and boldness of the

numbers themselves appear to be the same as other disclosures on the TILA statement, both the APR and FC are surrounded by a large bold box that sets these items apart from the other disclosures. The boxes are printed in bolder print than the boxes surrounding the amount financed and total of payments. In Flesher v. Household Finance Corp., 640 F.2d 861, 862 (6th Cir. 1980), the Sixth Circuit held that the lender did not violate TILA by highlighting the APR and FC in such a manner:

> We agree with the District Court that HFC complied with the Act by putting the "finance charge" and the "annual percentage rate" in a box with a heavy black line. The highlighting of the "annual percentage rate" and the "finance charge" by placing them in black boxes, constitutes a clear and conspicuous disclosure of such terms. Frank v. Reserve Consumer Discount Co., 398 F.Supp. 703 (W.D. Pa. 1975). (Emphasis added).

The cases cited by the BEACHES are distinguishable because the APR and FC were not printed more conspicuously than the other terms. In this case, the fact that the APR and FC were each in a box with a heavy black line and that these boxes with heavy black lines were not used with any of the other disclosures, made the APR and FC "more conspicuously" disclosed than the other terms of the loan. Therefore, this Court finds that GREAT WESTERN did not violate the "more conspicuous" rule.

(2) Initial Contract Interest Rate Disclosure

GREAT WESTERN placed the symbol "++" next to the APR disclosure of 8.82%. Underneath the FC box, GREAT WESTERN made the following disclosure: "++ YOUR INITIAL CONTRACT RATE IS 8.750%."

The BEACHES argue that, by placing the "++" in the federal box and typing in "YOUR INITIAL CONTRACT RATE IS 8.75%" immediately below that, but outside the federal box, GREAT WESTERN violated the segregation requirement found in §226.17(a)(1) of Regulation Z which states as follows:

> The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under §226.18.

In In re: Cook, 76 B.R. 661 (Bankr. C.D. Ill., 1987), the Illinois court stated that §226.17(a) contains two requirements:

> First, the disclosures must be made clearly and conspicuously, and second, the disclosures must be grouped together, be segregated from everything else and not contain any information not directly related to the required disclosures.

Because the required disclosures have been made clearly and conspicuously, the crux of the BEACHES' argument is that the second requirement of §226.17(a), that "the disclosures must be grouped together, be segregated from everything else and not contain any information not directly related to the required disclosures" has not been met.

The Official Staff Commentary to §226.17(a)(1)-4 contains the following comment on the segregation rule:

> Content of segregated disclosures. Footnotes 37 and 38 contain exceptions to the requirement that the disclosures under §226.18 be segregated from material that is not directly related to those disclosures. Footnote 37 lists the items that may be added to the segregated disclosures, even though not directly related to those disclosures. Footnote 38 lists the items required under §226.18 that may be deleted from the

> segregated disclosures and appear elsewhere. Any one or more of these additions or deletions may be combined and appear either together with or separate from the segregated disclosures ... (Emphasis added).

Thus, according to this comment, as well as Cook and the plain language of §226.17(a)(1), §226.17(a)(1) does not mandate that the disclosures required by §226.18 be segregated from all other information. Material that is directly related to the disclosures can be included with the disclosures.

The initial contract rate is clearly directly related to the annual percentage rate of the loan. The annual percentage rate is a function of the initial contract rate and the subsequent changes in the initial contract rate. Additionally, the initial contract rate was not listed in the federal box next to the annual percentage rate. If it was, it could confuse and mislead the borrower. The initial contract rate is set apart from the APR and located under the APR federal box. The only extraneous figure in the federal box is "++" which is a reference to the initial contract rate. Furthermore, in In re: Jones, 79 B.R. 233, 236 (Bankr. E.D. Pa., 1987), the court held that the inclusion of an extraneous figure, "$4,105.00", did not entitle the debtor to damages or rescission under TILA:

> In order to successfully assert a TILA claim for damages, whether in the nature of recoupment or otherwise, TILA violations in the disclosure statement must be among those enumerated in 15 U.S.C. §1640(a)(3). In order to give rise to a right to rescind, violations of the TILA must appear in the notice of the rescission right itself or must constitute a "material violation" of the TILA, as defined in 15 U.S.C. §1602(u) ...

> The third asserted violation, the inclusion of the extraneous figure in the "federal box" in purported violation of 12 C.F.R. §226.17(a), was factually disputed by the lender, who claims that the extraneous figure, the recitation of the $4,105.00 net figure which the debtor received, appeared only in an internal copy of the disclosure statement retained by the lender and not on the significant copy, i.e., the one delivered to the Debtor. Putting aside the factual issue of whether the $4,105.00 figure appeared on the debtor's copy or not, an issue which we cannot resolve on this record, it is apparent that the appearance of this figure, at most a technical violation of 12 C.F.R. §226.23(a), would not be within the scope of 15 U.S.C. §1640(a)(3) or 12 C.F.R. §226.23(a)(3).

Finally, the three cases cited by the BEACHES in support of their argument, Mason v. General Finance Corp., 542 F.2d 1226 (4th Cir. 1976); In re: Orr, 697 F.2d 1011 (11th Cir. 1983); and Friend v. Termplan, 651 F.2d 1012 (5th Cir. 1981); are distinguishable from the instant case because (1) those cases are inapplicable since they were decided before TILA was amended by the Truth-in-Lending Simplification and Reform Act of 1980, and (2) the cases involved state terms which were inconsistent and incompatible with the federal disclosures mandated by TILA. In this case, "Initial Contract Rate" is not a term required by Florida law to be disclosed on the disclosure statement and it is not inconsistent with the APR so as to confuse or mislead the consumer. GREAT WESTERN might have violated TILA if it had used the term "Contract Rate" rather than "Initial Contract Rate". Cook, although a post-simplification case, is also distinguishable from the instant case because that case involved the failure of the lender to clearly and conspicuously disclose a security interest in a car and to

segregate this information in the federal box. Cook did not involve a situation where information required by TILA was clearly and conspicuously disclosed in the federal box and other information not required by TILA was listed outside the federal box. Therefore, this Court finds that GREAT WESTERN did not violate TILA when it disclosed the initial contract rate on the TILA disclosure statement.

(3) Annual Percentage Rate, Finance Charge, Amount Financed, Total of Payments and Payment Schedule

Both parties agree that GREAT WESTERN misstated the APR by 0.035%, the finance charge by $201.84, the total of payments by $201.84, and the 348 payments in the payment schedule by 58 cents each. GREAT WESTERN argues that these misstatements did not violate TILA because they are all related to the misstatement of the APR and the deviation in the APR is within the tolerable limits allowed by TILA. 15 U.S.C. §1606 explains that TILA permits a deviation in the APR of 0.125%:

> The disclosure of an annual percentage rate is accurate for the purpose of this title if the rate disclosed is within a tolerance not greater than one-eighth of 1 per centum, more or less than the actual rate or rounded to the nearest one-fourth of 1 per centum. The Board may allow a greater tolerance to simplify compliance where irregular payments are involved.

Because the APR is misstated by only .03%, and 15 U.S.C. §1606 permits a tolerance of .125%, the APR disclosure is accurate.

However, footnote 41 to Regulation Z, §226.18(d) indicates that the finance charge disclosure is not accurate:

> The finance charge shall be considered accurate if it is not more than $5.00 above or below the exact finance charge in a transaction involving an amount financed of $1,000.00 or less, or not more than $10.00 above or below the exact finance charge in a transaction involving an amount financed of more than $1,000.00. (Emphasis added)

In this transaction, the finance charge is misstated by $201.84. In Steele v. The Ford Motor Credit Co., 783 F.2d 1016 (11th Cir. 1986), Ford understated the finance charge by $24.00. The 11th Circuit held that this understatement constituted a material violation of TILA and that the consumer could rescind the loan:

> Ultimately, however, whether the understatement was $24.00 or $32.00 is of no consequence. An examination of our precedents reveals that in this circuit any understatement of the finance charge is a material non-disclosure, although the possibility of a de minimis exception has not been ruled out ...
>
> . . . . .
>
> We believe that Bustamante, Harris and Davis, may be read consistently with each other for the proposition that any understatement of the finance charge is material because any understatement would be of some significance to a reasonable consumer. Although this proposition assumes that the finance charge is somehow more important than other required disclosures, that assumption makes sense. The finance charge is the total cost of the loan to the borrower. Although other factors might also be relevant, cost would likely be of prime importance to most reasonable consumers shopping for loans.
>
> Since Ford's retention of unearned interest resulted in non-disclosure of the proper

> finance charge on the second loan, since any understatement of the finance charge is material under our precedents, we reverse the district court's grant of summary judgment for Ford and remand for further proceedings consistent with this opinion.

Id. at 1018-1020. The court noted that although footnote 41 did not govern the Ford loan, the court "would likely reach the same result if they (the footnote) did apply since the finance charge for the loan was understated by more than $10.00". Id. at 1019. Therefore, the disclosed finance charge is not accurate, and GREAT WESTERN has violated TILA. See also, Gallegos v. Stokes, 593 F.2d 372 (10th Cir. 1979) (accepting the findings of the trial court that the disclosure provisions of TILA were violated by overstating the finance charge by $28.96, as well as by overstating the annual percentage rate and the monthly payment).

GREAT WESTERN cites the Federal Reserve Board's Truth-in-Lending Policy Guide ("Policy Guide") for the proposition that if the finance charge is misstated because the APR is misstated, and the APR deviation is within the tolerable limits allowed by TILA, then the misdisclosure of the finance charge is not a violation of TILA. The Policy Guide defines "Understated Finance Charge" as follows:

> "Understated finance charge" means a disclosed finance charge which, when increased by a numerical tolerance that is generated by the corresponding APR tolerance is less than the finance charge calculated under the Act.

Footnote 1 to this definition provides as follows:

> Finance charge tolerance: The finance charge tolerance for each loan will be generated by the corresponding APR tolerance applicable to

> that loan. For example, consider a single-payment loan with a one year maturity which is subject to a one quarter of one percent APR tolerance. If the amount financed is $5,000.00 and the finance charge is $912.50, the APR will be 18.25%. The finance charge generated by the APR of 18% on that loan would be $900.00. The difference between $912.50 and $900.00 produces a numerical finance charge tolerance of $12.50. If the disclosed finance charge is not understated by more than $12.50, reimbursement would not be ordered.

The Policy Guide, promulgated pursuant to 15 U.S.C. §1607, is used to determine if restitution is appropriate when the finance charge is understated in cases in which "the Federal Reserve Board acts on its own initiative ... as a policeman over its member banks." Ratner v. Chemical Bank New York Trust Company, 309 F.Supp. 983, 986 (S.D. N.Y. 1969). It does not apply when a private party, pursuant to 15 U.S.C. §1640, brings a civil action for damages or rescission under TILA. The Policy Guide does not state that the finance charge disclosure is "accurate" if it is within the numerical tolerance generated by the corresponding APR tolerance; it merely states that restitution is not appropriate in such cases. Therefore, because Footnote 41 of Regulation Z, §226.18(d) is the proper measure of accuracy, this court should rule that GREAT WESTERN violated TILA when it misdisclosed the finance charge by $201.84, the total of payments by the same amount, and the payment amount for the last 348 payments listed on the payment schedule by $.58 cents.

(4) Use of Estimates

GREAT WESTERN placed an asterisk following the TILA numbers in the annual percentage rate disclosure, the finance charge disclosure, the amount financed disclosure, the total of payments disclosure, and the payment schedule disclosure of 348 payments at $755.23. The disclosure statement indicates that: "* MEANS ESTIMATE." The BEACHES assert that GREAT WESTERN misdisclosed the variable rate feature by disclosing those figures as estimates which violated TILA. Section 226.17(c)(2) of Regulation Z states:

> (c) Basis of disclosures and use of estimates.
>
> (2) If any information necessary for an accurate disclosure is unknown to the creditor, it shall make the disclosure based on the best information reasonably available and shall state that the disclosure is an estimate.

With respect to variable rate transactions, paragraph 17(1)-9 of the Official Staff Commentary to §226.17 provides as follows:

> 9. Use of estimates in variable rate transactions.
>
> The variable rate feature does not, by itself, make the disclosures estimates.

The BEACHES assert that GREAT WESTERN erred in labelling the numerical disclosures as estimates because a lender cannot label those numerical disclosures as estimates merely because the parties have entered into a variable rate transaction. GREAT WESTERN correctly cites In re: Jones, supra, for the proposition that disclosing figures as estimates does not violate TILA when the disclosure statement contains the actual figures. However, as indicated above, both parties agree that some of the disclosed figures were inaccurate (overstated). Therefore, this case is

distinguishable from Jones. Where actual figures are available, and the lender discloses estimated or incorrect figures, the lender violates TILA. See, In re: Mitchell, 75 B.R. 593 (Bankr. E.D. Pa., 1987). Therefore, because GREAT WESTERN inaccurately portrayed the payment schedule, the annual percentage rate, the finance charge, the amount financed, and the total of payments as estimates, GREAT WESTERN violated TILA.

(5) Dollar Signs

The BEACHES cite Flesher v. Household Finance Corp., supra, for the proposition that the failure to use dollar signs in the payment schedule violates the "clear and conspicuous" rule. However, Flesher is distinguishable from the instant case because the lender in Flesher failed to include a dollar sign before the "default and deferment charge". Because of this omission, the borrower could have interpreted the amount disclosed as a percentage or some other charge. As a result, "plaintiffs did not know the charges to be paid upon their default or deferment under th[e] loan agreement." Id. at 862. In this case, it is clear that the "765.46" and "755.23" mean "$765.46" and "$755.23", especially in light of the fact that these numbers were in the "Amount of Payments" column. Therefore, GREAT WESTERN did not violate the "clear and conspicuous rule of TILA" by failing to place dollar signs in the payment schedule.

(6) Intangible Tax

The BEACHES contend that GREAT WESTERN misdisclosed the amount financed by improperly including the intangible tax in the amount financed and excluding the sum from the finance charge. Therefore, GREAT WESTERN violated TILA by overstating the amount financed and understating the finance charge. Regulation Z, §226.4(a) defines "Finance Charge" as follows:

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

The intangible tax on the mortgage is clearly a "charge ... imposed ... as an incident to or a condition of the extension of credit." If the BEACHES paid for the property in full with cash, the tax would not be charged to the BEACHES because there would be no mortgage. Thus, it is not a "charge of a type payable in a comparable cash transaction." Furthermore, the Official Staff Commentary to §226.4(a) states:

> 1. Charges in comparable cash transactions. Charges imposed uniformly in cash and credit transactions are not finance charges. In determining whether an item is a finance charge, the creditor should compare the credit transaction in question with a similar cash transaction. A creditor financing the sale of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or service. For example, the following items are not finance charges:

> Taxes, license fees, or registration fees, paid by both cash and credit customers. (Emphasis added).

This comment supports the conclusion that the mortgage intangible tax is a finance charge because the tax would not be incurred by a cash buyer.

GREAT WESTERN cites Regulation Z §226.4(e)(1) for the proposition that certain taxes and fees paid to public officials for perfecting the security interest can be excluded from the finance charge. §226.4(e)(1) provides as follows:

> (e) Certain Security Interest Charges.
>
> If itemized and disclosed, the following charges may be excluded from the finance charge:
>
> (1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing or satisfying a security interest.

The Official Staff Commentary to that section states:

> 4(e) Certain Security Interest Charges
>
> 1. Examples: Examples of charges excluded from the finance charge under 226.4(e)(1) include:
>
> Charges for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents.
>
> Stamps evidencing payment of taxes on property if the stamps are required to file a security agreement on the property.

The payment of the intangible tax is not required to "determin[e] the existence of or for perfecting, releasing, or

satisfying a security interest." The tax is not a "[c]harge for filing or recording" the mortgage. Furthermore, the intangible tax is not a documentary stamp tax. See, 53 FLA. JUR. 2d, Taxation §29:5 (although the same transaction often triggers both taxes, there are distinct differences between the stamp tax and the intangible tax). Therefore, GREAT WESTERN violated TILA because the intangible tax charge of $194.16 was improperly included as part of the amount financed.

B. What Remedies are Available to the BEACHES for Any Violations of the Federal Truth-in-Lending Act?

(1) Introduction

In Smith v. Fidelity Consumer Discount Company, 898 F.2d 896, 898 (3rd Cir. 1989), the Second Circuit succinctly stated the purposes of the Federal Truth-in-Lending Act and the remedies available to consumers for TILA violations:

> Through TILA, Congress sought to remedy the "divergent and often fraudulent practices by which credit customers were apprised of the terms of the credit extended to them." Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 262 (3rd Cir. 1975). Indeed, the congressionally stated purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U.S.C. §1601(a) ...
>
> TILA achieves its remedial goals by a system of strict liability in favor of the consumers when mandated disclosures have not been made. 15 U.S.C. §1640(a). A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor's intent. Thomka v. A.Z. Chevrolet, Inc., 619 F.2d 246, 249-50 (3rd Cir. 1980). "[O]nce the

> court finds a violation, no matter how technical, it has no discretion with respect to liability." Grant v. Imperial Motors, 539 F.2d 506, 510 (5th Cir. 1976).
>
> A single violation of TILA gives rise to full liability for statutory damages. Damages include actual damages incurred by the debtor plus a civil penalty equal to double the finance charge up to a maximum of $1,000.00. 15 U.S.C. §1640(a)(1)(2)(A)(i). Multiple violations of TILA in the course of a single loan transaction do not yield multiple civil penalties but result in only a single penalty. 15 U.S.C. §1640(g).
>
> In addition, when a creditor takes a security interest against property which is the principal dwelling of the debtor, the debtor has the right to rescind the transaction until the later of (1) midnight of the third day following the transaction or (2) the date on which the creditor delivers to the consumer the notice of the right of rescission and the material disclosures that TILA requires. 15 U.S.C. §1635. Exercise of the right to rescind under §1635 results in discharge of the consumer's liability for any finance charge or other charge and in discharge of any security interest taken in conjunction with the extension of creditor. 15 U.S.C. §1635(b).

(2) Rescission

15 U.S.C. §1635 governs the borrower's right to rescind a consumer credit transaction. §1635 provides as follows:

> Disclosure of Obligor's Right to Rescind
>
> Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open-end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the other person to whom credit is extended, the obligor shall have the right to rescind the

> transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under the subchapter, whichever is later .... (Emphasis Added).

However, §1635(e)(1) states that:

> This section does not apply to:
>
> (1) a residential mortgage transaction defined in §103(w).

Section 103(w) (15 U.S.C. §1602(w)) defines a "residential mortgage transaction" as:

> a transaction in which a mortgage ... or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.

The key issue is whether the instant transaction is one in which a mortgage was created to finance the acquisition or initial construction of the consumer's dwelling. Paragraph 2 of the Pretrial Stipulation submitted by both parties provides as follows:

> The proceeds of the loan were used to satisfy a preexisting construction loan from First Federal Savings which was utilized to pay for the construction of the Defendants' primary residence.

In regard to construction loans and permanent financing, paragraph 2(a)(24)-4 of the Official Staff Commentary to §226.2(a) provides in part as follows:

> Construction financing. If a transaction meets the definition of a residential mortgage transaction and the creditor chooses to disclose it as several transactions under §226.17(c)(6), each one is considered to be a residential mortgage transaction even if

> different creditors are involved. For example:
>
> . . . . .
>
> One creditor finances the initial construction of the consumer's principal dwelling and another creditor makes a loan to satisfy the construction loan and provide permanent financing. Both transactions are residential mortgage transactions.

According to the Pretrial Stipulation in this case, First Fidelity financed the initial construction of the BEACHES' home and GREAT WESTERN made their loan to satisfy First Fidelity's construction loan and to provide permanent financing. The staff commentary provides that both loans, the First Fidelity loan and the GREAT WESTERN loan, are residential mortgage transaction. Therefore, the BEACHES are not entitled to rescind the instant loan transaction.

In addition, 15 U.S.C. §1635(f) limits the existence of the right of rescission to three years after the consummation of the mortgage transaction. The BEACHES' failure to raise a rescission claim on or before August 15, 1989, would be absolutely fatal to any right to rescind which they would have had if this were not a residential mortgage transaction exempt under 15 U.S.C. §1635(e)(1). This court is unconvinced by the rationale of Dawe v. Merchants Marine, 683 P.2d 796 (Colo. 1984) and its progeny. Congress' omission in 15 U.S.C. §1635(f) of the recoupment and set-off language contained in 15 U.S.C. §1640(e) clearly establishes the parameters for this court concerning the continued vitality of

any rescission right which may have existed, after the expiration of three years.

(3) Statutory Damages

15 U.S.C. §1640(a)(2)(A) provides for the recovery of statutory damages even for a minor violation of TILA:

> (a) except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under §125, or chapter 4 or 5 of this title, with respect to any person is liable to such person in an amount equal to the sum of - - .....
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100.00 nor greater than $1,000.00; (Emphasis added)

15 U.S.C. §1640(e) provides for a one year statute of limitations for actions seeking civil damages for TILA violations but permits borrowers to affirmatively claim recoupment to offset the lender's debt collection action:

> Any action under this section may be brought in any United States district court, or in any court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this title in an action to collect a debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by state law. (Emphasis added).

Florida law permits a form of recovery by way of recoupment even though the statute of limitations has expired when the party pleads it defensively rather than as an independent cause of action. See, Allie v. Ionata, 503 So.2d 1237 (Fla. 1987). Thus, any statutory damages recoverable by the BEACHES are not barred by the statute of limitations.

In this case, the finance charge for the loan transaction exceeded $176,000.00. Therefore the BEACHES are entitled to the maximum amount of damages under the statute, $1,000.00 for GREAT WESTERN's TILA violations.

(4) For Actual Damages

15 U.S.C. §1640(a)(1) provides as follows:

> Civil Liability
> (a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under §125, or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of --
>
> (1) any actual damage sustained by such person as a result of the failure;

15 U.S.C. §1640(e) provides for a one year statute of limitations for actions seeking civil damages for TILA violations but permits borrowers to affirmatively claim recoupment to offset the lender's debt collection action. Florida law permits affirmative recovery by way of recoupment even though the statute of limitations has expired when the party pleads it defensively rather than as an independent cause of action. See Allie v.

Ionata, supra. Thus, any actual damages recoverable by the BEACHES are not barred by the statute of limitations. Therefore, the BEACHES are entitled to actual damages for GREAT WESTERN's TILA violations.

Actual damages, although recoverable, are difficult to prove especially in class actions. Adiel v. Chase Federal Savings and Loan Association, 630 F.Supp. 131 (S.D. Fla. 1986). In Adiel, the federal district court explained the proof required to recover actual damages:

> To recover actual damages, each member of the class must prove that "he or she would have gotten credit on more favorable terms but for the violation." McCoy v. Salem Mortgage Company, 74 F.R.D. 8, 12 (E.D. Mich. 1976). Relying on McCoy, the court in Vickers v. Home Federal Savings and Loan Association, 62 A.2d 1171 404 N.Y. S.2d 201, 202 (Sup. Ct. 1978) explained the showing necessary for a Plaintiff to recover actual damages under the Act:
>
> > A plaintiff claiming actual damages must establish a causal connection between the inaccurate disclosure and his injury by demonstrating he relied on the inaccurate disclosure and thereby was effectively prevented from obtaining better credit terms elsewhere.
>
> This "but for" operates to effectuate the very purpose of the Truth-in-Lending Act ...

Id at 133.

In Adiel the Plaintiff sought actual damages of the dollar amount of the loan points. The Southern District of Florida refused to award the plaintiffs actual damages, holding that the plaintiffs did not show "that they could have obtained credit on more favorable terms but for the alleged violation of the Act." Id.

The Bankruptcy Court for the Eastern District of Pennsylvania in In Re: Russell, 72 B.R. 855 (Bankr. E.D. Pa. 1987) disagreed with the test for actual damages promulgated in Adiel:

> We acknowledge that some cases have given the statutory provision (15 U.S.C. §1640(a)(1) a narrow reading). In Adiel v. Chase Federal Savings and Loan, 630 F.Supp. 131 (S.D. Fla. 1986); and McCoy v. Salem Mortgage Company, 74 F.R.D. 8 (E.D. Mich. 1976), the courts held that a consumer must prove "detrimental reliance," i.e. that he or she would have gotten credit on more favorable terms but for the violation, to be entitled to a recovery based on 15 U.S.C. §1640(a)(1).
>
> There are several reasons why we believe that such a narrow reading of §1640(a)(1) is in error. First, the entire TILA statute is remedial, disclosure legislation. In analogous federal Securities Exchange Act and Anti-Trust Act disclosure violation cases, the Supreme Court has repeatedly held that actual damages arise upon the Plaintiff's proof that a material disclosure misstatement has been made, irrespective of whether this misstatement actually resulted in conduct in reliance of it. (Citations omitted).
>
> Secondly, a 1980 amendment to the TILA clarified in 15 U.S.C. §1640(b) as follows, suggests the result that the consumer should be awarded, as actual damages, a reduction of undisclosed finance charges ...
>
> Finally, there is language in several TILA class actions which suggest that it is unrealistic and unnecessary for consumers alleging actual damages per 15 U.S.C. §1640(a)(1) to prove "detrimental reliance." ...
>
> In the instant factual setting, it is apparent that the Defendant failed to include either the $1,190.00 "origination fee" or the $300.00 commission" paid to Suburban Financial Services in the finance charge set forth in the Debtor's TILA statement. It is difficult to imagine a more blatant and fundamental violation of the TILA, or one more far removed

> from the technical and practically innocuous TILA violations that this court has determined entitle the consumer to only statutory damages ...
>
> . . . . .
>
> We therefore hold that, having totally failed to disclose $1,490.00 of what were clearly "finance charges" as such on the Debtor's TILA statement, the Defendant is liable to the Debtor for actual damages of $1,490.00 per 15 U.S.C. §1640(a)(1), in addition to $1,000.00 statutory damages pursuant to 15 U.S.C. §1640(a)(2)(A)(i).

Id. at 863-864.

Although these cases seem somewhat irreconcilable, the BEACHES have satisfied the Adiel test and shown that they could have obtained credit on more favorable times but for the alleged violation of the act. If GREAT WESTERN had not overstated the annual percentage rate, the finance charge, the total of payments, and the amount of each of the last 348 payments, they would have received credit on more favorable terms from GREAT WESTERN itself. Therefore, the BEACHES should be awarded actual damages in the amount of the overstated finance charge, $201.84, plus the amount of the intangible tax which was mischaracterized as part of the amount financed, $194.16 for a total of $396.00.

CONCLUSION

GREAT WESTERN committed a number of TILA violations in this loan transaction, including misdisclosure of the annual percentage rate, the finance charge, the total of payments and the amount of each of the last 348 payments. The BEACHES are entitled to

statutory damages in the amount of $1,000.00 and actual damages in the amount of $396.00, for a total damage award of $1,396.00. Therefore, this court shall off-set the amount owed to GREAT WESTERN under the Note by $1,396.00. However, the court will not rescind this transaction because it was a residential mortgage transaction exempt from rescission and the BEACHES failed to seek rescission within the three year time period in which the right to rescind would have existed had this transaction not been exempt.

JUDGMENT

By virtue of the foregoing, it is

ORDERED AND ADJUDGED:

1. Plaintiff, GREAT WESTERN BANK, is due from the Defendants, DAVID R. BEACH and LINDA M. BEACH, $94,678.68 as principal, $19,513.90 as interest, $897.16 as late charges, $5,756.35 for property taxes, less the BEACHES' damages of $1,396.00 making a total of $119,450.09, that shall bear interest at the rate of 12% per year. Attorney's fees and costs shall be added to the total sum due upon a further hearing by this court.

2. GREAT WESTERN holds a lien for the total sum superior to any claim or estate of the Defendants to this cause, on the following described real property located in Palm Beach County, Florida:

> LOT 31, SET-N-SUN, ACCORDING TO THE PLAT THEREOF ON FILE IN THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA, AS RECORDED IN PLAT BOOK 37, PAGES 143 AND 144.

3. The subject property shall not be sold and Plaintiff shall otherwise not execute on this judgment absent further order of this court.

4. Jurisdiction of this action is retained to enter further orders that are proper, including without limitation, an award of attorney's fees and costs to the Plaintiff, attorney's fees and costs to the Defendants, writs of possession and, if applicable, a deficiency judgment.

DONE AND ORDERED in Chambers, ~~West Palm Beach~~, Palm Beach County, Florida, this ___ day of _____, 1994.

SIGNED & DATED

MAR 23 1994

CIRCUIT COURT JUDGE
Judge Thomas E. Sholts

Copies Furnished:

STEVEN ELLISON, ESQ., Broad and Cassel, 400 Australian Avenue South, Suite 500, West Palm Beach, FL 33401

JAMES A. BONFIGLIO, ESQ., P.O. Box 1489, Boynton Beach, FL 33425

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orida Rule of Civil Procedure 1.380(2)(C), the order is defec- re because there is no finding of a willful and deliberate disre- ard of the trial court's prior orders. *See Tubero v. Chapnich*, 12 So. 2d 932 (Fla. 4th DCA 1989), *approved*, *Commonwealth ed. Sav. & Loan Ass'n v. Tubero*, 569 So. 2d 1271 (Fla. 1990). the court was exercising its authority under rule 1.200(c) be- use Camerota did not appear at the status conference as ordered the court, a finding that the party's conduct was willful and ontumacious is also necessary. *See Zeigler* v. *Huston*, 626 So. d 1046, 1047 (Fla. 4th DCA 1993). No such finding appears in ie record. If the court based its entry of a default on rule .500(b), the rules required that Camerota be served with notice f application for default because she had already appeared in the ction. The record, however, does not include such a pleading.

In this case, Camerota entered an appearance through her ttorney. She swore under oath that she did not receive any plead- ngs after her attorney advised her that the amended complaint ad been dismissed. Thus, the unrebutted affidavits establish that he never received the second amended complaint nor the order etting the status conference.

Here, the trial court denied the motion to vacate on grounds hat Camerota failed to demonstrate excusable neglect pursuant o rule 1.540(b).[1] Whether the default was entered pursuant to ule 1.200(c), 1.380(2)(C) or 1.500(b) "it is fundamental that in rder to properly enter a default after a party has appeared, no- ice of the intention to enter a default must be served on the par- y." *Zeigler*, 626 So. 2d at 1048.

Certificates of service appear on all relevant pleadings sent to he Pennsylvania address listed in the order granting the motion to withdraw. When documents are mailed to an addressee, there is a presumption of receipt. In *Allstate Insurance Co. v. Eckert*, 472 So. 2d 807, 809 (Fla. 4th DCA 1985), this court explained:

> The rule is that, when something is mailed by a business, it is presumed that the ordinary course of business was followed in mailing it and that the mail was received by the addressee. *Brown v. Giffen Industries, Inc.*, 281 So. 2d 897 (Fla. 1973). To expect evidence as to the individual, actual act of mailing or as to receipt of the mailed item would be "totally unreasonable." *Id.* at 900.

It is thus presumed that the pleadings and orders mailed to Camerota at her Pennsylvania address, which included the motion to withdraw, the order granting that motion and Kaufman's second amended complaint, were received by her. This presumption, however, is not irrebuttable. While a sworn affidavit stating that the filing was not received will not automatically overcome the presumption, such an affidavit will create an issue of fact which must be resolved by the trial court. As explained by the first district in *Abrams v. Paul*, 453 So. 2d 826, 829 (Fla. 1st DCA 1984), where a party seeking to vacate a default judgment has filed supporting affidavits stating that notice had not been received:

> The issue is therefore a factual one requiring the trial court to weigh the evidence and make a determination as to whether the notice was received. . . . Since the record reflects no evidentiary hearing on the issue, and the quoted language from the order, supra, indicates that the trial court's determination was based upon the incorrect premise that the presumption of receipt established by the certificate of service could not, as a matter of law, be overcome by the defendant's sworn statements, we reverse the order of denial and remand the cause to the trial court for determination of the essential fact.

Because Camerota's supporting affidavits are sufficient to create an issue of fact as to the receipt of notice, the trial court was obligated to make its determination only after an evidentiary hearing. Upon remand, the trial court should also make a determination as to the procedural basis for the entry of the default and whether proper procedures pursuant to the Florida Rules of Civil Procedure were followed prior to the entry of the default judg-

concur.)

[1]If the default was entered pursuant to Florida Rule of Civil Procedure 1.500(b), then before setting it aside, the trial court must determine that the party demonstrated excusable neglect, that the party demonstrated due diligence upon learning of the default, and that the party had a meritorious defense. *Gibraltar Serv. Corp. v. Lone & Assocs.*, 488 So. 2d 582, 584 (Fla. 4th DCA 1989). However, this standard of review is not equally applicable to default entered as a sanction or for failure to appear at a status conference. *See Zeigler v. Huston*, 626 So. 2d 1046, 1047 (Fla. 4th DCA 1993).

* * *

Consumer law—Truth in lending—Action to foreclose home mortgage, with defendants asserting affirmative defenses, including right to rescission under federal Truth in Lending Act—Borrower's right to rescind transaction for TILA violations within three years of closing is extinguished after lapse of the three-year period—Because right to rescission dies with lapse of three-year period, defendants could not assert that right as defense in recoupment more than three years after closing—Question certified: Under Florida law, may an action for statutory right of rescission pursuant to Truth in Lending Act, 15 U.S.C. § 1635, be revived as a defense in recoupment beyond the three-year limit on the right of rescission set forth in section 1635(f)?

DAVID R. BEACH and LINDA M. BEACH, his wife, Appellants, v. GREAT WESTERN BANK, Appellee. 4th District. Case No. 94-1049. L.T. Case No. CL 92-6071 AG. Opinion filed January 31, 1996. Appeal from the Circuit Court for Palm Beach County; Thomas E. Sholts, Judge. Counsel: James A. Bonfiglio of James A. Bonfiglio, P.A., Boynton Beach, for appellants. Steven Ellison of Broad and Cassell, West Palm Beach, for appellee.

(WARNER, J.) This is a case of first impression in Florida. The issue presented is whether a consumer has a right to rescind a mortgage on a home, under 15 U.S.C.A. section 1635 of the Truth in Lending Act (TILA), as a defense by way of recoupment to the lender's foreclosure action, when the defense is asserted beyond the three year period set forth in the statute. *See* TILA, 15 U.S.C.A. § 1601 et seq. (West 1982 & Supp. 1995). We hold that under Florida law, a consumer is not entitled to rescind the mortgage transaction and is limited to a damage set-off as provided in TILA.[1]

Congress originally enacted TILA to create disclosure requirements to insure meaningful disclosure of credit terms by lenders so that consumers could determine the reasonableness of a lender's charge. *E.g., Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975). As part of the statutory requirements, the consumer is given the right to rescind a transaction that results in the creditor taking a security interest in the consumer's principal dwelling. 15 U.S.C.A. § 1635(a). The consumer has an absolute right to rescind the agreement for three business days following the closing of the transaction. *Id.* Rescission may be extended for up to three years if the creditor fails to make all material disclosures to the borrower as required by TILA. 15 U.S.C.A. § 1635(f); Regulation Z, 12 C.F.R. Pt. 226.23(a) (1994) ("Reg. Z"). Exercise of the right to rescind under 15 U.S.C.A. section 1635 results in the discharge of the consumer's liability for any finance and other charges paid by the consumer and in the discharge of any security interest taken in conjunction with the extension of credit. 15 U.S.C.A. § 1635(b); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir.), *aff'd in part*, 898 F.2d 907 (3d Cir. 1990). Thus, the lender would only be able to collect on the principal of the loan and would lose any security for the collection of the loan.

TILA also provides for money damages for TILA violations. 15 U.S.C.A. § 1640(a)(1)-(2)(A). While there is a one year limitation on the commencement of a cause of action for money damages, the statute specifically provides that as a defense of recoupment or set-off to an action for collection of the debt, a consumer may assert violations of TILA and the damages to which the consumer would be entitled under the statute. 15 U.S.C.A. § 1640(e).

With that brief overview of TILA, we turn now to the facts of this case. The appellants first obtained a mortgage from First Fidelity Savings and Loan for the construction of their residence. The mortgage was not strictly a construction loan mortgage as it reflected a 30-year payout. There was no requirement for conversion to permanent financing in the loan. After completion of the construction, the appellants moved in, made two payments, and then entered into a another loan transaction with the appellee Great Western Bank ("the bank"), the proceeds of which were applied to pay off and satisfy the original mortgage loan. The bank provided appellants with Truth in Lending Act disclosure documents. At the closing, the bank furnished the appellants with the three day notice of their right to rescind. The loan transaction closed in August of 1986.

On December 1, 1991, the appellants defaulted on the loan by failing to make their installment payments. In June 1992, the bank instituted foreclosure proceedings. The appellants raised affirmative defenses to the foreclosure action, including the assertion of their right to rescind and TILA damage claims. In ruling in favor of the bank upon final judgment, the trial court found, alternatively, that based upon certain factual stipulations, the transaction was an exempt transaction not subject to rescission, and also that the failure of the appellants to assert the right to rescind within three years of the closing of the transaction was fatal to the claim. The court then determined the actual damages of $396 and statutory damages of $1,000 to which the appellants were entitled under TILA, set them off against the balance due the bank, and determined that the bank's lien was superior to all other encumbrances. The court did not immediately order foreclosure. From that order this appeal has been taken.

The parties stipulated that the loan from the bank was made to satisfy the original lender's construction loan and to provide permanent financing. A mortgage loan secured to finance the acquisition or initial construction of a residence is exempt from the rescission requirements of TILA. 15 U.S.C.A. §§ 1635(e)(1), 1602(w). The staff commentary to Reg. Z, 12 C.F.R. Pt. 226.2(a), provides that where one creditor finances the initial construction of the residence and another creditor makes a loan to satisfy the construction loan and provide permanent financing, both transactions are residential mortgage transactions within the meaning of the exemption. Reg. Z, 12 C.F.R. Pt. 226, Supp. I, § 226.2, cmt. 2(a)(24)-4 (1994) (Official Staff Interpretations of Regulation Z). Based on the commentary together with the stipulation, the trial court found that both the First Fidelity loan and the bank's loan were residential mortgage transactions and therefore exempt from statutory rescission. On appeal, the appellants note that while the bank was paying off a construction loan, the original lender's loan not only was for construction but included permanent financing. In fact, the original loan partook of more characteristics of permanent financing than construction financing. Moreover, the appellants occupied their home for a few months before applying for the bank loan. Finally, the appellants more or less claim that the bank waived its right to assert an exemption from rescission because the bank in fact gave them that right in their disclosure documents at closing, thus acknowledging that the transaction was not exempt. We tend to agree that the stipulation is not dispositive and that the factual aspects of this transaction indicate that this is not an exempt transaction. However, further discussion of this point is unnecessary because of our other holding.

The Right of Rescission

The appellants contend that they can assert the right of rescission as a defense in recoupment for TILA violations even beyond the three year period of the statute, relying on *Dawe v. Merchants Mortgage and Trust Corp.*, 683 P.2d 796 (Colo. 1984).[2] The trial court rejected the rationale of *Dawe*, determining that Congress's omission of recoupment or set-off in the section providing for that the right of rescission was not a defense in recoupment and that the right expired after three years. We agree for the following reasons.

In 15 U.S.C.A. section 1635(f), Congress provides:

> An obligor's right of rescission *shall expire three years after the date of consummation of the transaction* or upon sale of the property, whichever occurs first . . . .

15 U.S.C.A. § 1635(f) (emphasis supplied). In *Dawe*, the Colorado Supreme Court held that a debtor's demand for section 1635(f) rescission constituted a defense in the nature of recoupment and thus, the debtor was not barred by the three year expiration period. The court relied on *Bull v. United States*, 295 U.S. 247, 55 S. Ct. 695, 79 L. Ed. 1421 (1935), which held that because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded, it is never barred by the statute of limitations so long as the main action itself is timely. 295 U.S. at 262. However, the recoupment ordered by the Supreme Court was the offset of estate taxes erroneously paid on a transaction, when raised as a defense to a suit by the government for the payment of income taxes on the same transaction. The court viewed the retention of the estate taxes paid to the government through mistake as tantamount to fraud, and the government's retention of those tax payments was unjust and immoral. Recoupment was therefore equitable in nature to prevent an unjust result. In concluding recoupment could be raised as a defense, the Court cited as authority the case of *Williams v. Neely*, 134 F. 1 (8th Cir. 1904). That case emphasized that "recoupment is, in its nature and essence, an equity .... Recoupment is the keeping back of something that is due because there is an equitable reason for holding it." *Id.* at 4-5.

The right of rescission for violations of TILA does not, in our opinion, fall within those equitable reasons required to apply recoupment. Because under section 1640 the borrower is entitled to assert damages as a defense in recoupment, the borrower is compensated for any monies which the creditor may have collected or will collect for violations of TILA. The further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years.

Dawe also suggests that it is necessary to allow rescission as recoupment beyond the three year period, because if it were barred, lenders could avoid the penalties of TILA by waiting three years to sue on the borrowers' default and thereby frustrate the statutory policy. First, we find it unlikely that a lender would hold a loan in default for two or three years without taking action to collect it. Modern banking regulations make this highly unlikely. Regardless of the lender's actions, default on the note by the borrower is the triggering event of any suit to foreclose on the security interest. If the borrower pays on the loan as required, there is no reason for the lender to sue the borrower. Therefore, it is entirely within the control of the borrower as to whether the creditor has the ability to foreclose on its security interest in the residence. The buyer could bring a direct claim during the first three years, and after that time, merely by defaulting on the mortgage and forcing a foreclosure action, the buyer could also secure rescission by way of recoupment. Thus, by using recoupment as a method of asserting rescission, the buyer could take advantage of the remedy throughout the entire life of the secured transaction, rendering the statutory limitation meaningless. For this reason, we do not find that *Dawe's* argument that lenders could take advantage of the claim is persuasive. Borrowers also could take advantage of the creditor by strategically defaulting and asserting rescission as a recoupment defense.

Whether one may agree with *Dawe* or not, the ultimate question is whether as a matter of Florida law, the defensive assertion of rescission should be allowed. The appellants argue that *Allie v.* [illegible] 592 So. 2d 1227 (Fla. 1987), permits the assertion of

lie recognized the basic rule that recoupment may be asserted en though the underlying claim is barred by the applicable tute of limitations as an independent cause of action. It further ld that once a party files an affirmative action, the defendant ay assert any affirmative defense or compulsory counterclaim hich stems from the same transaction. *Id.* at 1240. *Allie* addressed a claim barred by a statute of limitations, which bars not e right, but the remedy. *Id.*

As explained later in *Rybovich Boat Works, Inc. v. Atkins*, 585 o. 2d 270 (Fla. 1991), the holding of *Allie* "rested primarily on onsiderations of public policy and fairness as well as an analysis f the purpose of statutes of limitation." *Id.* at 271. *Allie* considred the application of limitations to claims for damages at comon law. *Rybovich*, on the other hand, refused to permit the ssertion of a time-barred claim for specific performance of a eal estate contract as a defense to an action for damages under he contract, noting the adverse consequences on the free alienbility of title through the resurrection of a barred specific performance claim. In the instant case, the bank points out that in its eport to Congress on Truth In Lending in January 1972, the Board recommended that a limitation on the right to rescind be established because the title to residential real properties may become clouded by the uncertainty regarding the right of rescission. *Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth In Lending for the Year 1971*. That limitation was eventually enacted as section 1635(f).

The three year limitation contained within section 1635(f) is not a limitation on the remedy, but an expiration of the right after three years from the date of the closing of the transaction. In *Bowery v. Babbit*, 99 Fla. 1151, 128 So. 801 (Fla. 1930), the court noted a general rule of construction:

> [W]here a statute confers a right and expressly fixes the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and that the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided. [citations omitted]. In other words, when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right.

Id. at 1163, 128 So. at 806 (citations omitted). Our court followed that rule in *Fowler v. Matheny*, 184 So. 2d 676 (Fla. 4th DCA 1966), in construing a limitation period contained within the Uniform Sale of Securities Law:

> F.S.A. § 517.21 created an entirely new right of action that did not exist at common law and expressly attached thereto, without any exception, the proviso that the action must be brought within two years from the date of sale [of securities]. Such a limitation of time is not like any ordinary statute of limitation affecting merely the remedy, but it enters into and becomes a part of the right of action itself, and if allowed to elapse without the institution of the action, such a right of action becomes extinguished and is gone forever.

Id. at 677; *see also Special Disability Trust Fund v. Southern Bell Tel. & Tel. Co.*, 551 So. 2d 575 (Fla. 1st DCA 1989).

This point was not addressed by *Dawe*, which made the assumption that section 1635(f) was a statute of limitations which barred a remedy as opposed to a special statutory action with its own limitation. However, this assumption is contrary to federal statutory construction principles. In *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957), the court explained the difference in terms much like *Bowery*:

> That this is hornbook law, a reference to 34 Am. Jur. 'Limitation of Actions', Sec. 7, 'Qualifications Annexed to Right of Action' will show: 'A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the [illegible] is not a statute

of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. *Such a provision will control, no matter in what form the action is brought.* The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. . . ." (Emphasis supplied.)

Id. at 704-05. Thus, Florida law and federal law appear consistent as to the proper analysis of this statute.

The right of rescission of a security interest for material violations of TILA disclosures is not a right existing under the common law. It is clearly and only the creation of statute. While the legislature may be without power to abolish common law rights, the legislature may create other rights and impose on them such limitations as it deems advisable. When it does, those limitations form part of the assertion of the right itself. *Bowery*. Here, a borrower has the right to rescind a transaction for TILA violations within three years of closing or until sale of the property. Therefore, based upon *Bowery*, *Fowler*, and *Simon*, that right was extinguished with the lapse of the three year period contained within the statute's terms.

Indeed, one may glean this construction from the very language of the statute itself. "An obligor's right of rescission *shall expire three years after the date of consummation of the transaction* or upon sale of the property, whichever occurs first . . . ." 15 U.S.C.A. § 1635(f) (emphasis supplied). The remedy is not merely barred: the right dies with the lapse of time.[3]

Other portions of TILA also support our construction. Section 1640 provides for damages for TILA violations. While the statute contains a one year limitation for actions for damages, it also specifically provides that despite the limitation, damages may be sought as "defense by recoupment or setoff." Certainly, when Congress intended that recoupment should be allowed, it knew how to say it. *See Russello v. United States*, 464 U.S. 16 (1983) (when Congress includes particular language in one section of a statute and omits it in another section of the same act, it is generally presumed Congress acts intentionally and purposely in disparate inclusion or exclusion). Therefore, if this were a matter of legislative intent, traditional rules of statutory construction would lead us to the conclusion that we cannot infer a Congressional intention to permit rescission beyond three years. Thus, there appears no policy reason apparent in the statute for our court to permit an expired right to be asserted as an equitable defense of recoupment.

A Florida case most closely analogous to the present case is *Devlin v. Aetna Finance Co.*, 379 So. 2d 972 (Fla. 5th DCA), *cert. denied*, 389 So. 2d 1108 (Fla. 1980). In *Devlin*, the creditor had filed suit to recover a debt to which the borrower asserted TILA violations as a common law recoupment defense. At the time the suit was instituted, section 1640 of TILA provided that an action for damages expired one year from the closing of the transaction. There was no extension for recoupment. The county court and then the circuit court sitting in its appellate capacity both determined that the defense could not be asserted beyond the statutory limitation. On petition for writ of certiorari review, the district court found no departure from the essential requirements of law, holding as follows:

> Whether the statutory right to recover twice the finance charges under the Federal Truth In Lending Act may be asserted beyond the one-year statutory limitation is, in our opinion, a legislative decision for Congress. The statute as written provides a one year limitation which we find clear and properly enforceable to bar the recoupment defense here asserted.
>
> Congress well knew that most debtors would become aware [illegible] violations in the Truth In Lending Act only when the

debtor contacts a lawyer to defend a suit on the debt brought by the creditor. The policy decision of whether the penalty of twice the finance charge is an affirmative cause of action or a defense is one best left to the Legislature rather than the courts. Congress presumably enacted the one-year limitation for some reason and they were aware of the realities of consumer credit transactions as indicated above. We are advised by counsel for petitioners that an amendment to the Truth In Lending Act is pending in Congress which would specifically answer the question posed in these cases. We are convinced that the remedy of the petitioners/debtors herein is by a change in the statute.

Id. at 973-74 (citation and footnote omitted). The court was referring to the 1980 amendment which permitted the assertion of damages as a defense in recoupment beyond the one year limitation. As noted before, Congress did not see fit to add the same savings clause to section 1635. The reasoning of *Devlin* is consistent with our analysis.

The appellants point to the policy of the courts that TILA be liberally construed in favor of the consumer to effectuate its remedial purpose. *See Flesher v. Household Fin. Corp.*, 640 F.2d 861 (6th Cir. 1981); *Riggs v. Government Employees Fin. Corp.*, 623 F.2d 68 (9th Cir. 1980). However, as noted in *Riggs*, the courts which have construed the Act as remedial have been concerned with the damage remedies under section 1640. *Riggs*, 623 F.2d at 70. By allowing damages for TILA violations as a claim in recoupment, the lender is penalized for violations and the consumer is entitled to offset the indebtedness either by the borrower's actual damages or by statutory damages, whichever is greater. A liberal construction of TILA does not require the court to add remedies where Congress chose not to permit them, particularly where the alternative remedy of damages is available. To allow the consumer to assert the expired right of rescission in recoupment as a matter of public policy where Congress has not chosen to extend it does not sufficiently provide us with a public policy reason for extending recoupment. Under the law of Florida and our construction of TILA, we hold that the statutory right of rescission under TILA expires three years after the closing of the transaction and may not be revived as a defense in recoupment in an action to collect the debt upon the buyer's default.

With respect to the other points raised on appeal, we find that the trial court committed no reversible error, and therefore we affirm the final judgment.[4]

Because this is a question of great public importance, potentially affecting thousands of mortgages in the state, we also certify the following question:

UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635 BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?

(DELL, J., concurs. PARIENTE, J., dissents with opinion.)

(PARIENTE, J., dissenting.) The majority concludes that Florida law would not permit a debtor to raise an untimely claim for rescission under TILA as a defense to a mortgage foreclosure action. I disagree and find support for the ability of the debtor to raise the claim defensively in both *Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1987), and *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940).

The majority's rejection of the defensive use of rescission rests on its interpretation of congressional intent. To the extent that the majority's opinion turns on construing congressional intent by reading the provisions of TILA *in pari materia*, it is certainly reasonable, based on a comparison of 15 U.S.C.A. § 1635(f) with 15 U.S.C.A. § 1640(e), to reach a conclusion that Congress intended to cut off the right of rescission after three years, allowing only set-off of damages as a defense in recoupment. *See* Truth in Lending Act, 15 U.S.C.A. §§ 1601-1677 (West 1982 & Supp. 1995).

However, this construction of congressional intent is less reasonable in light of the 1995 amendment, § 1635(i)(3), which provides that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." This amending language, which applies to all consumer credit transactions in existence, runs contrary to an interpretation that Congress intended to treat the right of rescission as governed by a strict statute of repose, precluding the ability of the debtor to raise it defensively. *See James v. Home Constr. Co.*, 621 F.2d 727 (5th Cir. 1980); *Dawe v. Merchants Mortgage & Trust Corp.*, 683 P.2d 796, 798 n.5 (Colo. 1984). *But see Jamerson v. Miles*, 421 F. Supp. 107 (N.D. Tex. 1976), *disagreed with, James*, 621 F.2d at 728; *Fenton v. Citizens Sav.*, 400 F. Supp. 874 (C.D. Mo. 1975). Moreover, § 1635(f) was not part of the original statute, but rather has been described as part of a series of technical amendments designed to improve the administration of TILA.[5] In fact the original version of § 1635, which created the statutory remedy of rescission, had no time limitations.

I would follow the rationale first enunciated in *Dawe* and subsequently adopted by the courts in *FDIC v. Ablin*, 532 N.E.2d 379 (Ill. App. 1988), and *Community National Bank & Trust v. McClammy*, 525 N.Y.S. 2d 629 (N.Y. App. Div. 1988), that the debtor's right to rescind, while barring a claim for affirmative relief after the limitations period has run, is not a bar to asserting that claim as a defense. These courts, however, did not discuss whether the rescission remedy would be applied in a different manner because it was raised defensively. Yet, the *Dawe* court did observe that the debtors did not seek restitution of the installment payments; rather, they sought to avoid liability for future payments on the note. *Dawe*, 683 P.2d at 799.

Part of the difficulty in analyzing this issue has been the use of the concept of rescission by way of recoupment.[6] Although historically the plea of recoupment differed from the plea of set-off in some significant respects, the distinctions between the pleas have been largely eliminated by statute and by rules of modern pleading as explained in some detail by Justice Shaw in *Cherney v. Moody*, 413 So. 2d 866 (Fla. 1st DCA 1982), *adopted*, *Allie*, 503 So. 2d at 1239. Thus, the over-all concept, whether referred to as recoupment, set-off, compulsory counterclaim or affirmative defense, is that a party otherwise barred from instituting an action because of a time limitation was freed from that bar when acting in a defensive posture. *Allie*. The Eleventh Circuit in *Smith v. American Financial Systems*, 737 F.2d 1549, 1552 (11th Cir. 1984), enunciated a three-part test for recoupment: 1) the TILA violation and the creditor's debt arose from the same transaction; 2) the debtor is asserting the claim as a defense; and 3) the main action is timely. All three prerequisites are satisfied here.

The majority views rescission as having inflexible and draconian ramifications for the lender automatically resulting in cancellation of its security interest.[7] Certainly when viewed in this light, rescission varies significantly from the type of claims which could traditionally be pled as a defense in recoupment.

However, § 1635(b) provides that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court." *See also* 12 C.F.R. § 226.23(d)(4) ("[t]he procedures outlined . . . may be modified by court order"). Rather than creating an inflexible penalty for TILA violations, courts addressing this issue have permitted judicial modification of the statutory rescission process. *See, e.g.*, *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992). When viewed as a flexible remedy, a "court may impose conditions that run with the voiding of a creditor's security interest upon terms that would be equitable and just to the parties in view of all surrounding circumstances." *Id.* at 1142. In *Williams*, the bank's request had been to condition voiding of the security interest upon the debtor's return of the loan proceeds:

In deciding whether or not to impose conditions upo[r]

Williams, the district court should consider traditional equitable notions, including such factors as the severity of Homestake's TILA violations and whether Williams has the ability to repay the principal amount. While the goal should always be "to restor[e] the parties to the status quo ante," [citations omitted] rescission must also maintain its vitality as an enforcement tool.

. If rescission can be applied as a flexible equitable remedy, ere appears to be compelling public policy reasons for allowing scission to be pled as a defense in recoupment if otherwise lowed by state law, with the precise method of enforcing the medy left to judicial determination based on the surrounding rcumstances.

If TILA does not expressly preclude a debtor from raising scission as a defensive claim, then the question is whether lorida law otherwise would prohibit it. The majority concludes at Florida law would bar a debtor's right to raise rescission as affirmative defense or compulsory counterclaim. I respectlly disagree.

Florida clearly adheres to the principle that the defense of coupment may be asserted even though the underlying claim is arred by the applicable statute of limitations as an independent ause of action. *See Allie*. In its holding, *Allie* relied on *Beekner*, hich recognized the right of the debtor to raise the defense of sury when a lender sued on a usury-infected contract, even ough the claim of usury as an affirmative cause of action would ave been barred. In *Beekner*, the lender sued to foreclose a ortgage securing notes for a loan. The debtor raised usury as a efense to defeat foreclosure. Our supreme court first pointed to he public policy considerations of allowing the debtor to raise sury, observing that "a contrary holding would enable the lender to purge a usury infected contract by the simple process of waiting the running of the statute of limitations before bringing he suit." *Beekner*, 145 Fla. at 156, 198 So. at 796. The court vent on to explain that:

> This view, regardless of the nicety of pleading is strengthened by the general proposition that a defense should be as long-lived as a cause of action . . . . This rule in law would not be more generous in its effect than a similar one in equity.

Id. at 156-57, 198 So. at 796. The *Beekner* court approved of the use of usury as a shield to defeat recovery, but left unanswered the question of whether the time-barred claim could also be used as a sword to obtain affirmative relief. That question was answered in *Allie*.

In *Allie* our supreme court held that not only could a time-barred claim be raised as a defense, but the claim could be used as a vehicle for obtaining affirmative relief instead of merely defeating recovery. *Allie* concerned a seller who sued for the unpaid balance on the notes for two tracts of land. The buyer then interposed the seller's fiduciary breach and pled recoupment as a defense, requesting restitution and rescission of the contracts for the sale of the land. Our supreme court allowed the defensive claims of rescission and restitution, even though the statute of limitations for rescission of the contract had expired and the buyer would have been unable to institute an action for rescission.

The *Allie* court reasoned that limitation statutes were "designed as shields to protect defendants against unreasonable delays in filing law suits and to prevent unexpected enforcement of stale claims." 503 So. 2d at 1240. However, these purposes are inapplicable when the same claim is raised as a defense:

> A party who seeks affirmative relief, whether through an original complaint or a counterclaim, effectively asserts that he is prepared to prosecute all aspects of that matter. Having sufficient knowledge of the facts to support a complaint and sufficient evidence to prosecute that complaint, he must be prepared to defend against any affirmative defenses arising therefrom. Thus, once a party files an affirmative action, he cannot thereafter profess to be surprised by or prejudiced by affirmative defenses

Id. The holding in *Allie* rested primarily on considerations of public policy and fairness as well as an analysis of the purposes of statutes of limitations.

By permitting an otherwise-expired cause of action to be raised as an affirmative defense or a compulsory counterclaim, *Allie* allowed the defendant to recover an affirmative judgment. Because the defensive claims included restitution and rescission, the holding in *Allie* is particularly applicable to the analysis of what defenses Florida would allow a debtor to raise under TILA in a case arising from the same loan transaction.

Rybovich Boat Works v. Atkins, 585 So. 2d 270, 272 (Fla. 1991), while approving *Allie*, did not extend the defense of recoupment to allow a time-barred action for specific performance of a contract for the purchase and sale of real property. However, our supreme court specifically acknowledged that other remedies available to an aggrieved buyer could include rescission as well as liquidated damages. *Id.* Allowing a debtor to raise a TILA defense to a suit for foreclosure on a mortgage is far closer to *Beekner* where the effect of allowing a time-barred claim of usury was to defeat the foreclosure action and to *Allie* where the court allowed the defensive claims of restitution and rescission.

I also disagree with the majority's reasoning that because the TILA cause of action runs from the date of the incident the principles underlying the defense of recoupment as explained in *Allie* and *Beekner* are rendered inapplicable. Although TILA has created a new statutory cause of action, the remedy of rescission is one derived from the common law. The statute modifies the common law right of rescission and renders it an available remedy for statutory violations of TILA. Also, the cases cited by the majority do not address the issue of whether an expired cause of action could nevertheless be raised defensively. Because the right of rescission is one derived from the common law, I do not see how it could be abrogated without a clear statutory expression of intent to do so—especially in light of the 1995 amendments which added the language stating that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." *See James*.

Because there is no question that TILA defenses can be raised and presented to the trial court in a suit for mortgage foreclosure, the controversy is over the extent of the remedy available to rectify violations of TILA arising out of the loan transaction. In my opinion, allowing a defense of rescission in combination with vesting trial courts with the discretion to consider equitable factors before ordering rescission comes closest to effecuating the congressional intent of TILA without running afoul of Florida law.

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[1]We have reviewed the Truth in Lending Act Amendments of 1995, which the appellants have supplied as supplemental authority. Pub. L. No. 104-29, 109 Stat. 271 (September 30, 1995). Section 8 of the Truth in Lending Act amendments of 1995 addresses rescission rights in foreclosure and amends 15 U.S.C. section 1635. The amendments in part provide that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." *Id.* § 8 (to be codified at 15 U.S.C. § 1635(i)(3)). While we do not analyze whether and to what extent these amendments have retroactive effect, we have analyzed and applied Florida law to resolve the instant case.

[2]*Dawe* has been relied on by other courts, and we recognize that there is a split of authority in the country on this issue. We do not cite or distinguish the other cases because their reasoning is consistent with *Dawe*.

[3]The statute is in the nature of what we term a statute of repose rather than a statute of limitation, as the time period runs not from the borrower's discovery of TILA violations but from the closing of the transaction. As to the distinction between statutes of limitation and statutes of repose, see generally *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992).

[4]We note that the trial court found that the bank violated TILA by including the intangible tax as part of the amount financed. We have recently held in *Pignato v. Great Western Bank*, 20 Fla. L. Weekly D2338 (Fla. 4th DCA Oct. 18, 1995), that this is not a violation of TILA. However, the bank did not cross-appeal this issue. Therefore, it has not been preserved for review.

[5]In *James v. Home Construction Co.*, 621 F.2d 727 (5th Cir. 1980), the fifth circuit addressed the issues of whether the newly-enacted three-year statute of limitations should apply prospectively and whether a TILA cause of action [illegible] § 1635(f) was a

limitation on the existence on the substantive right to rescind rather than a true statute of limitations. The court observed:

> The fact that s 1635 is a statutorily created right and not a common law one should make little difference in a consideration of whether or not this cause of action survives. Rather, the key inquiry in a situation like this one centers on what was the Congressional intent in passing s 1635(f). We think it clear that Congress meant to have the statute applied prospectively. First, the Truth-in-Lending Act, a remedial act, has usually been given a broad liberal interpretation since it is assumed that was the intent of Congress. *Listefield v. Walt Flanagan & Co.*, 498 F.2d 1133 (10th Cir. 1974). Second, the Conference Committee report on the Truth-in-Lending Act amendments of which s 1635(f) were [sic] a part, described these amendments as "a series of basically technical amendments designed to improve the administration of the Truth in Lending Act." H.R. Conf. Rep. No.93-1429, 93d Cong., 2d Sess. (1974), U.S. Code Cong. & Admin. News 1974, pp. 6119, 6152.

Id. at 729.

[4]Recoupment was a plea of common law origin arising from the same transaction which did not allow the recovery of an affirmative judgment; whereas setoff—a defense of statutory origin—could arise from a separate transaction and would permit recovery of an affirmative judgment. Modern rules of procedure have largely obliterated the historical distinctions. *See Cherney v. Moody*, 413 So. 2d 866 (Fla. 1st DCA 1982), *adopted*, *Allie v. Ianata*, 503 So. 2d 1237, 1239 (Fla. 1987). For a discussion of the divergent authority between the courts in viewing TILA claims as either pleas of set-off or recoupment, see generally *Smith v. American Financial Systems*, 737 F.2d 1549, 1552-53 (11th Cir. 1984).

[5]In support of this conclusion, the majority cites to the language of § 1635(b) and *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir.), *aff'd in part*, 898 F.2d 907 (3d Cir. 1990).

* * *

Wrongful death—Sovereign immunity—Death occurring in automobile collision after defendant's decedent lost control of his vehicle on I-95 and travelled across the median strip into northbound lane—Department of Transportation was entitled to summary judgment based on sovereign immunity in plaintiffs' action alleging that Department negligently created a known dangerous condition by failing to construct and maintain a barrier dividing northbound and southbound lanes of I-95—Record did not suggest that accident in this case was result of operational level decision regarding design and construction beyond Department's planning level decision to install a median separating northbound and southbound lanes—Order granting plaintiffs' motion for summary judgment as to individual defendant's affirmative defense, which asserted that plaintiffs' damages were caused by Department of Transportation, was not an appealable non-final order

HELEN CYGLER, as Executrix of the Estate of ROBERT P. USA, SR., Deceased, and HELEN CYGLER, as Executrix of the Estate of STACY T. USA, deceased, Appellants, v. JOHN J. PRESJACK, Individually, and as Surviving Spouse and Personal Representative of the Estate of ILLA KIMBERLY PRESJACK, Deceased, JOHN EDWARD PRESJACK, Individually, and as Surviving Minor Child, JOHN EDWARD PRESJACK and ROBERT TAYLOR PRESJACK, By and Through Their Next Of Kin and Guardian/Natural Parent, JOHN J. PRESJACK, and THE FLORIDA DEPARTMENT OF TRANSPORTATION, an Agency of the STATE OF FLORIDA, Appellees. 4th District. Case No. 94-2388. L.T. Case No. 93-2602AB. Opinion filed January 31, 1996. Appeal from the Circuit Court for Palm Beach County; James R. Stewart, Judge. Counsel: Janis Brustares Keyser of Gay Ramsey & Lewis, P.A., West Palm Beach, for Appellant-Helen Cygler. Joe Reiter of Lytal & Reiter, P.A., and Jane Kreusler-Walsh of Jane Kreusler-Walsh, P.A., West Palm Beach, for Appellees-John J. Presjack, John Edward Presjack and Robert Taylor Presjack. Maria A. Mudano and David S. Tadros of Walton Lantaff Schroeder & Carson, West Palm Beach, for Appellee-The Florida Department of Transportation.

(SCHAPIRO, SHELDON M., Associate Judge.) Defendant, Helen Cygler, as executrix of the estates of Robert P. Usa, Sr., and Stacy T. Usa, appeals from final summary judgment in favor of co-defendant, the Department of Transportation ("the Department"). Because we find that the Department was immune from liability under principles of sovereign immunity, we affirm.

On January 18, 1993, Cygler's decedent, Robert P. Usa, Sr., was travelling in a southbound direction on I-95 in Palm Beach Gardens, Palm Beach County, Florida, when he allegedly lost control of his vehicle and travelled across the median strip into the northbound lane colliding with the vehicle driven by decepassengers, John J. Presjack, John Edward Presjack and Robert Taylor Presjack, sustained personal injuries.

As a result, plaintiffs, John J. Presjack, John Edward Presjack, and Robert Taylor Presjack, filed an action for personal injuries and wrongful death against Cygler in her capacity as personal representative of Robert and Stacy Usa. In response, Cygler raised as an affirmative defense that plaintiffs' damages were, in fact, caused by the Department, a third party over which the defendants had no control. Subsequently, plaintiffs amended their complaint to add the Department as a co-defendant in the action, claiming that the Department, by its failure to construct and maintain a barrier dividing the northbound and southbound lanes of I-95, had negligently created a known dangerous condition.

The Department filed a motion for summary judgment, maintaining *inter alia*, that it was shielded from liability by virtue of the doctrine of sovereign immunity. The trial court agreed, and granted summary judgment in favor of the Department. Cygler moved the trial court to enter a final judgment in favor of the Department to enable her to appeal this matter. We affirm.

Generally, within the realm of sovereign immunity, the discretionary, judgmental, planning-level decisions of a governmental entity are immune from suit, while operational level decisions are not. *Department of Transp. v. Neilson*, 419 So. 2d 1071, 1075 (Fla. 1982). With regard to decisions of the Department, as stated by the supreme court in *Department of Transportation v. Konney*, 587 So. 2d 1292, 1294 (Fla. 1991), sovereign immunity attaches to planning decisions, as "decisions concerning the initial plan, road alignment, traffic control device installation, or the improvement of roads and intersections are not matters which would subject a governmental entity to liability, because these activities are basic capital improvements and are judgmental, planning level functions." The supreme court has also held that alleged defects in the construction of the road, the median, and the intersection, are defects in the overall plan of the road and therefore are the result of a planning level function to which absolute immunity attaches. *Ingham v. Department of Transp.*, 419 So. 2d 1081, 1082 (Fla. 1982).

We note, however, that although the overall plan of a road or highway may be a planning level decision immune from liability, the Department may waive sovereign immunity and thus be liable at the operational level where it has created a known dangerous condition. As explained by the supreme court in *City of St. Petersburg v. Collom*, 419 So. 2d 1082, 1085 (Fla. 1982):

> We find that a governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning-level decision. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be labelled a judgmental, planning-level decision. . . [I]t is only logical and reasonable to treat the failure to warn or correct a known danger created by government as negligence at the operational level.

Cygler contends that the Department waived sovereign immunity in this case by negligently maintaining I-95 at the location of the accident in such a condition so as to create a trap or dangerous condition not readily apparent to travellers on that highway. As support she cites *Ferla v. Metropolitan Dade County*, 374 So. 2d 64 (Fla. 3d DCA 1979), *cert. denied*, 385 So. 2d 759 (Fla. 1980). In that case, it was alleged that the actual design and construction of a median strip on a highway caused a car accidentally coming into contact with it to become airborne. The court held that the design decision, made after the initial planning-level decision to construct a median, is an operational decision not immune from liability. In reaching this conclusion, the court stated that:

> [t]he determination of the precise configuration of the media

reflect this requirement. *See Amendments to Florida Rules of Criminal Procedure*, 21 Fla. L. Weekly S518, S519 (Fla. Nov. 27, 1996). In the instant case, however, the court's failure to conduct a *Huff* hearing was harmless because no evidentiary hearing was required and relief was not warranted on the motion.

Groover's final claim involves the trial court's dismissal of his amended postconviction motion. The court based the dismissal on several grounds, including the fact that Groover failed to verify the amended motion under oath as required by rule 3.850. *See* Fla. R. Crim. P. 3.850 (c) (motion shall be under oath). Contrary to Groover's argument, rule 3.850 requires that *all* motions be verified, even where the motion amends a previously filed verified motion. Failure to meet the oath requirement warrants dismissal of the motion without prejudice. *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993). Thus, we find no error in the trial court's dismissal of Groover's unverified amended motion.

Accordingly, we affirm the trial court's denial of Groover's motion for postconviction relief and dismissal of his amended motion.

It is so ordered. (OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.)

[1]As noted above, Groover has already received a life sentence for the Sheppard murder, as Parker did upon resentencing. Thus, there is no disparity in these sentences.

* * *

Consumer law—Truth in lending—Mortgage foreclosure action with defendants asserting rescission right as defense in recoupment for Truth in Lending Act violations—Action for statutory right of rescission pursuant to TILA cannot be revived as a defense in recoupment beyond the three-year limit on right of rescission contained in 15 U.S.C.A. section 1635(f)—Statutory right of rescission is extinguished three years after transaction's closing

DAVID R. BEACH, et ux., Petitioners, v. GREAT WESTERN BANK, etc., Respondent. Supreme Court of Florida. Case No. 87,835. February 13, 1997. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fourth District - Case No. 94-1049 (Palm Beach County). Counsel: James A. Bonfiglio, Boynton Beach, for Petitioners. Steven Ellison of Broad and Cassel, West Palm Beach, for Respondent.

(PER CURIAM.) We have for review *Beach v. Great Western Bank*, 670 So. 2d 986 (Fla. 4th DCA 1996). We accepted jurisdiction to answer the following question certified to be of great public importance:[1]

> UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635, BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE-YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?

670 So. 2d at 994.

For the reasons expressed below, we answer the certified question in the negative and approve the Fourth District's decision. We find the majority's opinion persuasive and well-reasoned. The dissent is equally cogent; however, we believe the cases relied upon therein simply use the inappropriate analysis for statutory rescission by equating the expiration period with a statute of limitations. Nevertheless, we commend both the majority and the dissent for their thoughtful and comprehensive examination of the issue before us.

MATERIAL FACTS

Petitioners David and Linda Beach (the Beaches) obtained a bank mortgage to finance their home construction in 1985. The loan was a hybrid construction/home loan mortgage as it reflected a thirty-year payout. *Beach v. Great Western Bank*, 670 So. 2d 986, 989 (Fla. 4th DCA 1996). Upon completion of construc- Western) in August 1986. The Beaches used those loan proceeds to pay off and satisfy the initial loan. *Id.* at 989. Great Western provided the Beaches with Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667 (1994), disclosure documents and, at the closing, notified them of their absolute right to rescind the agreement within three business days following the transaction.[2]

Five years later on December 1, 1991, the Beaches defaulted on their mortgage after failing to make their installment payments. 670 So. 2d at 989. Subsequently, Great Western instituted a foreclosure action in June 1992. In response, the Beaches raised several affirmative defenses, including their right to rescind and TILA damage claims. The basis of the Beaches' rescission claim was several overstatements made by Great Western on the disclosure documents. The trial court found that Great Western overstated the Beaches' monthly mortgage payment by fifty-eight cents ($.58), resulting in a $201.84 overcharge. The court also found that Great Western overstated the finance charge by $7.24 ($176,519.21 rather than $176,511.97). The trial court ruled for Great Western on the rescission issue, finding that the loan was an exempt transaction not subject to rescission,[3] and that the Beaches' failure to assert their rescission right within three years of closing precluded their claim. 670 So. 2d at 989. However, the trial court awarded the Beaches $396 in actual damages and $1000 in statutory damages as provided by TILA[4] to remedy the overstatements, set them off against the balance due Great Western, and found Great Western's lien superior to all other encumbrances. 670 So. 2d at 989.

On appeal to the Fourth District, the Beaches contended that they could assert their rescission right as a defense in recoupment for TILA violations even beyond the three-year period fixed by the statute. *Id.* at 990. The district court disagreed, concluding that recoupment is primarily an equitable remedy designed to prevent unjust enrichment. *Id.* Recognizing that the statute already provides borrowers a right to assert damages as a defense in recoupment, the court deemed the further remedy of rescission as a penalty provision to creditors and further noted that the rescission right was purely a creation of the statute itself and that statute specifically fixed a time limitation on the right. *Id.* at 990-93. Consequently, the district court affirmed the trial court's final judgment, holding that under Florida law the statutory right of rescission in TILA expires three years after the transaction closing date and may not be revived as a defense in recoupment to a creditor's foreclosure action. *Id.* at 993. Finally, recognizing the potential significance of its decision to thousands of other Florida borrowers, the district court certified the above question for our review. *Id.* at 994.

LAW AND ANALYSIS

As the district court acknowledges, there is a "split of authority in the country on this issue," *Beach*, 670 So. 2d at 990 n.2, over whether the right of rescission may be asserted as a defense to recoupment for TILA violations beyond the statute's three-year expiration period. We begin our analysis with an overview of TILA and the relevant caselaw.

In 1968, Congress enacted TILA with the broad purpose of ensuring "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *See* 15 U.S.C. § 1601(a)(1994). As part of the Act, Congress provided the consumer with the absolute right to rescind the secured transaction within three business days following closing for any reason, and up to three years from the date of closing date if the creditor failed to make all material disclosures. Section 1635(f) of 15 U.S.C. (1994), expressly provides: "An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon sale of the property, whichever occurs first . . . ." When a borrower exercises his or her right to rescind in either of the above circumstances, he or she

The end result is that the lender can only collect on the loan principal and loses any security for the loan's collection. *Beach*, 670 So. 2d at 989.

TILA also provides for actual and statutory damages in section 1640(a). Furthermore, while section 1640(e) includes a one-year statute of limitations, it also specifically "does not bar a person from asserting a violation . . . in an action to collect the debt . . . as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law." This savings clause is only found in this section relating to damages; no corresponding clause accompanies the expiration of the statutory right of rescission in section 1635.

Congress also recognized that the complexity and variety of credit transactions precluded comprehensive regulation by a single statute. Accordingly, it delegated extensive authority to the Federal Reserve Board to implement regulations governing commerce in credit. 15 U.S.C. § 1604(a). In this case, the result was Part 226 of Title 12 of the Code of Federal Regulations, better known as Regulation Z. *Selected Commercial Statutes* 1543 (West Publishing Co., 1995 ed.).

The United States Supreme Court has stated that "deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). Administrative expertise in this highly technical area should be recognized "[u]nless demonstrably irrational." *Milhollin*, 444 U.S. at 565. While an agency's interpretation of its own regulations has traditionally been accorded considerable respect, *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), deference is all the more appropriate in this case as "Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law." *Milhollin*, 444 U.S. at 566. Thus, any analysis of a TILA issue should include Regulation Z and the Official Commentary thereto, *see Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981), in addition to the statute's plain language.

Regulation Z treats the right of rescission as follows:

> The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

12 C.F.R. § 226.23(a)(3) (1996) (footnote omitted).

Similarly, the Official Staff Commentary concisely states that "the right to rescind automatically lapses on the occurrence of the earliest of the following three events: [t]he expiration of 3 years after consummation of the transaction . . . . " 12 C.F.R. § 226.23, para. 23(a)(3)3. (Supp. I 1996). Likewise, as previously noted, the statute itself provides:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon sale of the property, whichever occurs first
>
> . . . .

15 U.S.C. § 1635(f) (1994). In conjunction, these three authorities reflect Congress's intent regarding rights of rescission under TILA. Their clarity and plain meaning support the majority opinion below.[6] However, that does not end our inquiry.

In Florida, "[i]t is well established that the defense of recoupment may be asserted defensively where the underlying claim is barred by the statute of limitations." *Willoughby v. Dowda & Fields, Chartered*, 643 So. 2d 1098, 1099 (Fla. 5th DCA 1994) (on rehearing); *see also Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1st DCA 1987); *Merchants Mortgage & Trust Corp.*, 683 P.2d 796 (Colo. 1984),[7] a case the Beaches and the dissent below rely upon.

In *Dawe*, the Colorado Supreme Court held that the borrower's demand for rescission was a defense in the nature of recoupment and was not barred by section 1635(f)'s three-year expiration period. However, as noted by the district court, the *Dawe* court simply assumed that section 1635(f) was a statute of limitations which precluded a remedy, rather than a statute which created the right and the remedy, and included its own expiration period. *Beach*, 670 So. 2d at 992.

Moreover, the borrowers in *Dawe* defaulted less than a year after consummating their loan, well within TILA's three-year rescission window. However, the creditor did not seek a judgment for the unpaid principal until more than four years later, outside the three-year window. The creditor's apparent bad faith clearly influenced the *Dawe* court as it concluded that if "recoupment claims were barred by the relevant statute of limitations, lenders could avoid the penalties of the Act by waiting, as here, three years or more to sue on the borrower's default, and thereby frustrate the fundamental policy of TILA." 683 P.2d at 801. In short, the *Dawe* court used a statute of limitations analysis and a strong inference of creditor bad faith with which to justify its rescission of the loan agreement beyond the three-year expiration period.

The *Dawe* court also relied on *Bull v. United States*, 295 U.S. 247 (1935) to reach its equitable result. In *Bull*, the Court ordered recoupment as an offset of estate taxes mistakenly paid on a transaction, which had been raised as a defense to an IRS suit for the payment of back income taxes on the same transaction. 295 U.S. at 261. The Court recognized that "[w]hile here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights." *Id.* Thus, as the district court stated, "[r]ecoupment was therefore equitable in nature to prevent an unjust result." *Beach*, 670 So. 2d at 990. In contrast, the inequities which undoubtedly influenced the decisions in *Dawe* and *Bull* are not present in the case before us.

The Beaches and the dissent below also place great reliance on our decisions in *Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1987), *Rybovich Boat Works v. Atkins*, 585 So. 2d 270 (Fla. 1991), and *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940). However, all of these cases addressed statutes of limitation and are thus distinguishable. None of the cases addressed a TILA-type statute where the act created the right and provided a remedy.

In *Allie*, petitioner Allie (Ionata's accountant and financial advisor) sold respondent Ionata several parcels of land whose prices Ionata eventually found (several years later) to be severely overinflated. Ionata stopped making payments and sued for restitution and rescission, alleging fraud and breach of fiduciary duty. In response, petitioner Allie pled the four-year statute of limitations as an affirmative defense and counterclaimed for the unpaid balance on two of the notes. At trial, the jury found Allie not guilty of actual fraud, but did find he *breached his fiduciary duty*. On appeal, the Fifth District found respondent Ionata's action on two of the notes barred by the statute of limitations. Upon review, we held that a counterclaim of recoupment of money damages may be asserted even though the underlying claim itself would have been time-barred if raised as a separate cause of action. *Allie*, 503 So. 2d at 1239-40.

In *Rybovich*, respondent Atkins entered into a land purchase contract in June 1985 with petitioner Rybovich. Atkins never gave Rybovich the required seven-days' advance notice of the closing date. The closing, which could occur no later than December 1987, never took place. In February 1988, the parties exchanged letters each declaring the other in default. Later that month, Rybovich entered into another contract to sell the property to a third party. Upon hearing of the pending sale, Atkins' had an interest in said property. Consequently, the title company would not insure the property against Atkins' claim and the entire transaction failed. Rybovich sued Atkins for breach of contract, tortious interference with the second transaction, and slander of title. Atkins counterclaimed for, among other things, specific performance of the original land sale contract. Rybovich responded that the specific performance claim was barred by the one-year statute of limitations and the trial court agreed.

On certiorari review, the Fourth District relied on *Allie* and quashed the trial court's order. We, in turn, quashed the district court's decision and reinstated the trial court's order, refusing to permit Atkins' assertion of the time-barred claim for specific performance as a defense to Rybovich's damages action. We explained that allowing such a claim "would have the effect of placing a cloud on the title of any real property that was the subject of a failed contract for purchase and sale." *Rybovich*, 585 So. 2d at 271. We noted the harshness of specific performance and recognized that "[a]dequate remedies remain available to buyers . . . . " *Id.* at 272. Those remedies included common law rescission of contracts, not statutory rescission as in this case.

In *Beekner*, petitioner Beekner raised the defense of usury (25% interest rate) in a collection action by respondent Cappel to foreclose a mortgage securing notes for a loan. We considered the question of whether the usury defense provided in section 6942, Compiled General Laws (1927), could be precluded by the two-year statute of limitations included in section 4663, Compiled General Laws (1927). We allowed the usury defense, noting that "a contrary holding would enable the lender to purge a usury-infected contract by the simple process of awaiting the running of the statute of limitations before bringing his suit." *Beekner*, 145 Fla. at 156, 198 So. at 796.

After closely reviewing *Allie*, *Rybovich*, and *Beekner*, we conclude that none of those cases addressed the specific situation found here where a statute simultaneously created a right and its remedy. Furthermore, and just as significantly, the losing party in each of those cases demonstrated bad faith conduct, a factor not present in the case before us. Thus, we find that *Allie*, *Rybovich*, and *Beekner* are not controlling.

Turning to this case, the district court concluded that "[t]o allow the consumer to assert the expired right of rescission in recoupment as a matter of public policy where Congress has not chosen to extend it does not sufficiently provide us with a public policy reason for extending recoupment." *Beach*, 670 So. 2d at 993. Moreover, the district court's rationale further distinguishes this case from *Allie* as that case was decided "primarily on considerations of public policy and fairness as well as an analysis of the purpose of statutes of limitation." *Rybovich*, 585 So. 2d at 271. We also noted that

> [f]undamental fairness required this result in *Allie*. A contrary holding would have authorized plaintiffs to take advantage of technical quirks in the law to file their lawsuits after defendants' counterclaims have become time-barred. Under such a scheme, even the grossest misconduct by the plaintiff could be excluded from the court's consideration. Statutes of limitation are intended to promote fairness, not to encourage this type of misconduct.

Id. Unlike *Dawe* and *Allie*, no such manipulation of technical defenses occurred in this case. On the contrary, we agree with the district court that the real danger is that borrowers "could take advantage of the remedy throughout the entire life of the secured transaction, rendering the statutory limitation meaningless." *Beach*, 670 So. 2d at 991. The Beaches' three-year limit on the right of rescission expired in 1989. They subsequently defaulted in December 1991 and Great Western filed its foreclosure action in June 1992. Great Western exercised its foreclosure rights only after the Beaches failed to meet their obligation. Thus, by making their monthly mortgage payments, the Beaches' had full control over Great Western's "ability to foreclose on its security interest in the residence." *Id.* Furthermore, the Beaches' remedy to the foreclosure action. The savings clause in section 1640 preserved that option beyond the one-year statute of limitations as a "defense by recoupment or setoff."

In contrast, Congress did not include such a savings clause in section 1635 regarding the right of rescission. Indeed, section 1635(f) explicitly provides that *both the right and the remedy expire* three years after the closing date. Thus, as the district court notes, TILA mirrors a statute of repose, not a statute of limitations, 670 So. 2d at 992 n.3, in that it "precludes a right of action after a specified time . . . rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued." *Kush v. Lloyd*, 616 So. 2d 415, 420 (Fla. 1992).

As a general rule, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Therefore, despite the Beaches' assertion that section 1635(f) should not be given its plain meaning, we read that section as unambiguously expressing Congress's intent to extinguish the statutory right of rescission three years after the transaction's closing.

Similarly, this Court traditionally has avoided "readings that would render part of a statute meaningless." *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 456 (Fla. 1992); *Villery v. Florida Parole & Probation Comm'n*, 396 So. 2d 1107 (Fla. 1980); *Cilento v. State*, 377 So. 2d 663 (Fla. 1979). Underlying that caution is our assumption that legislatures do not "enact purposeless and therefore useless, legislation." *Sharer v. Hotel Corp. of America*, 144 So. 2d 813, 817 (Fla. 1962). Furthermore, "[w]hen the legislature has used a term . . . in one section of the statute but omits it in another section of the same statute we will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995); *see also Florida State Racing Comm'n v. Bourquardez*, 41 So. 2d 87, 88 (Fla. 1949) ("The legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction. . . . ").

More precisely, we have long recognized that "when the right and the remedy are created by the same statute, the limitations on the remedy are treated as limitations of the right." *Bowery v. Babbit*, 99 Fla. 1151, 1163-64, 128 So. 801, 806 (1930). In *Bowery*, we emphasized that the "statute limiting the time to bring suit . . . is not regarded as a technical statute of limitations." 99 Fla. at 1164, 128 So. at 807. Therefore, *Bowery* controls our interpretation of TILA under Florida law. As we have detailed, *Allie*, *Rybovich*, and *Beekner* all addressed distinct and separate questions of law and thus we are unpersuaded by the Beaches' and the lower court dissent's extensive citation of those cases.

Consistent with *Bowery*, the Fifth Circuit's opinion in *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957) reflected federal statutory construction principles when it reasoned:

> A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right.

Id. at 704-05 (quoting 34 Am.Jur. *Limitation of Actions* § (1941)); *see also Maahs v. United States*, 840 F.2d 863, 866 n. (11th Cir. 1988) (explaining difference between statutes of limitation and expiration period in Federal Tort Claims Act, which created previously non-existent right to sue government in tort noting under FTCA "very right to sue evaporates after the exp

ration of the stated time"). Thus, as stated in the district court's opinion, "Florida law and federal law appear consistent as to the proper analysis of this statute." *Beach*, 670 So. 2d at 992. We agree with the district court's analysis. Therefore, we hold that under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f).

CONCLUSION

The facts of this case do not compel us to disregard a statute's plain meaning. If "[r]ecoupment is the keeping back of something that is due because there is an equitable reason for holding it[.]" *Williams v. Neely*, 134 F. 1, 5 (8th Cir. 1904), the Beaches' claims have little merit. As the district court stated, "[t]he further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years." *Beach*, 670 So. 2d at 990.

Accordingly, we approve the decision below and answer the certified question in the negative.[1] We decline to address the other issues raised by the Beaches which were neither in the district court's opinion nor within the scope of the certified question.

It is so ordered. (OVERTON, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur. SHAW, J., recused.)

---

[1]We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

[2]TILA also allows rescission up to three years after the transaction if the creditor fails to make all material disclosures to the borrower. This three-year extension, section 1635(f), based upon the lender's bad faith in not disclosing material terms, is the key provision at issue in this case. Material disclosures include the loan's annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule.

[3]"Residential mortgage transactions" are exempt from TILA's rescission requirements. Section 1602 (w) defines these loans as "created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling."

[4]Section 1640 provides for actual and statutory damages and includes a one-year statute of limitations in subsection (e). However, section 1640(e) also contains a savings clause which specifically allows "defense by recoupment or set-off" beyond the one-year statute of limitation.

[5]This is in contrast to common law rescission whereby the rescinding party must first tender the property received under the agreement before the contract is considered void. *See* Joel P. Bishop, *Commentaries on the Law of Contracts* § 833 (Enlarged ed. 1887); *see also Kamerman v. Curtis*, 33 N.E.2d 530 (N.Y. 1941); *E.T.C. Corp. v. Title Guarantee & Trust Co.*, 2 N.E.2d 284 (N.Y. 1936).

[6]Of note, Congress enacted TILA amendments in 1995. Although the new provision does not relate to this case's factual situation, the committee report ("Committee Report Regarding Truth-in-Lending Act Amendments of 1995, Section 113, Rescission Rights in Foreclosure") reiterates the plain meaning of the statute. Specifically, "[t]he consumer protection provisions in this section are intended to benefit consumers that are unable to meet their mortgage obligations and are not intended as a mechanism whereby consumers can avoid their obligations by defaulting and then raising the defense in foreclosure." Furthermore, "[r]escission rights expire in three years. The time period shall not be extended except as explicitly provided in section 125(f) relating to agency enforcement proceedings." That exception does not apply to this case.

[7]Relying on *Dawe*, similar reasoning was used in *Federal Deposit Insurance Corp. v. Ablin*, 532 N.E. 2d 379 (Ill. App. Ct. 1988); *Community National Bank & Trust Co. v McClammy*, 525 N.Y.S. 2d 629 (N.Y. App. Div. 1988); *In re Shaw*, 178 B.R. 380 (Bankr. D. N.J. 1994); and *In re Botelho*, 195 B.R. 558 (Bankr. D. Mass. 1996).

* * *

Criminal law—Sentencing—Guidelines—Sentence combining nonstate sanctions pursuant to 1994 sentencing guidelines is not a departure sentence—Trial court is not required to provide written reasons for such sentence

STATE OF FLORIDA, Petitioner, vs. LEONARD S. PERRY, Respondent. Supreme Court of Florida. Case No. 88,192. February 13, 1997. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. 1st District - Case No. 95-4628 (Duval County). Counsel: Robert A. Butterworth, Attorney General and James. W. Rogers, Tallahassee Bureau Chief, Criminal Appeals, Senior Assistant Attorney General, Tallahassee, for Petitioner. Nancy A. Daniels, Public Defender and P. Douglas Brinkmeyer, Assistant Public Defender, Chief, Appellate Intake Division, Second Judicial Circuit, Tallahassee, for Respondent.

(WELLS, J.) We have for review a decision certifying the following question to be of great public importance:

> IS THE RULE IN *STATE v. DAVIS*, 630 So. 2d 1059 (Fla. 1994), REQUIRING WRITTEN REASONS FOR DEPARTURE WHEN COMBINING NONSTATE PRISON SANCTIONS, APPLICABLE UNDER THE 1994 SENTENCING GUIDELINES?

Perry v. State, 673 So. 2d 557 (Fla. 1st DCA 1996). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

We answered this question in *State v. Simmons*, No. 87,618 (Fla. Feb. 13, 1997). There we wrote:

> [T]he 1994 guidelines contain no disjunctive wording and require new interpretation. Florida Rule of Criminal Procedure 3.702(b) contains a clear statement that existing case law, as i construes the application of sentencing guidelines, is superseded by operation of rule 3.702 if the case law conflicts with rule 3.702. We hereby give effect to rule 3.702(b) by holding tha *Davis*, with its emphasis upon disjunctive wording, does nc apply to a sentencing imposed under the 1994 guidelines as em bodied in rule 3.702.

Simmons, slip op. at 4.

Accordingly, we answer the certified question in the negative quash the district court's decision as it relates to combining nor state prison sanctions, and remand for proceedings consiste with this opinion. We decline to review the second cross-appe issue raised by respondent because the issue is unrelated to th certified question upon which this Court's jurisdiction is based.

It is so ordered. (OVERTON, SHAW, GRIMES, HARDING, and ANSTEAD, JJ., concur.)

* * *

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

District Court of Appeal, Fourth District

WHEREAS, in that certain cause filed in this Court styled:

DAVID R.BEACH, et ux. V. GREAT WESTERN BANK, etc.

Case No.: 87,835

Your Case No.: 94-1049

The attached opinion was rendered on: February 13, 1997

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Gerald Kogan, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 2nd day of July, 1997.

Clerk of the Supreme Court of Florida

ORIGINAL

No. 97-5310

Supreme Court, U.S.
FILED
AUG 22 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under Florida law, may an action for statutory right of rescission pursuant to the Truth-in-Lending Act, 15 U.S.C.A. Section 1635, be revived as a defense in recoupment beyond the three-year limit on the right of rescission set forth in Section 1635(f)?

PARTIES TO THE PROCEEDINGS

Respondent would add the following individuals and entities as parties to the proceedings in accordance with Federal Rule of Appellate Procedure 26.1 and Supreme Court Rule 29.6:

1. Richard W. Glenn, Esquire, attorney for Petitioners.
2. Patricia Lebow, P.A., Broad and Cassel, 400 Australian Avenue South, Fifth Floor, West Palm Beach, FL 33401 – Attorney for Respondent.
3. Ocwen Federal Bank, assignee of Respondent.
4. Ocwen Financial, Inc., parent company of Ocwen Federal Bank.

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STATEMENT OF JURISDICTION

Respondent generally agrees with the Petitioners' Statement of Jurisdiction but would state that jurisdiction is not appropriate under 28 U.S.C. § 1254(1) or Rule 10(b) of the Rules of the Supreme Court.

STATUTE INVOLVED

In addition to the statute cited by Petitioners, Respondent would include for this Court's consideration:

§ 1635(i). RESCISSION RIGHTS IN FORECLOSURE. –

(1) IN GENERAL. – Notwithstanding section 139, and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if –

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) TOLERANCE FOR DISCLOSURES. – Notwithstanding section 106(f), and subject to the time period provided in subsection (f), for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this title.

(3) RIGHT OF RECOUPMENT UNDER STATE LAW. – Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

(4) APPLICABILITY. – This subsection shall apply to all consumer credit transactions in existence or consummated on or after the date of the enactment of the Truth in Lending Act Amendments of 1995.

STATEMENT OF THE CASE AND FACTS

Respondent disagrees with Petitioners' Statement of Facts and Case on several points. No determination has been made by any court that the disclosures given by Great Western Bank contained material errors which gave the Beaches the extended right to rescind under 15 U.S.C. § 1635. In fact, the errors contained in Great Western's disclosure statements amounted to an overstatement of the finance charge by the sum of $7.24. Based thereon, Great Western was actually at a slight disadvantage to

other lending institutions if the Beaches had credit shopped. Since the focus of the appellate courts in Florida was solely on the expiration of the right to rescind, the question of materiality was not significant.

Petitioners correctly note Great Western sued to foreclose the mortgage more than three years from the 1986 closing. In fact, more than five years had passed. To avoid any incorrect implication, it must be noted that the Beaches went into default well after the three-year expiration and only shortly before Great Western filed its foreclosure action.

Although Florida's Fourth District Court of Appeal did render a divided opinion (two judges in favor of affirmance, one dissenting) Florida's Supreme Court affirmed without dissent. The opinion issued by the Supreme Court was a per curiam affirmance joined by all judges with the exception of Justice Shaw who recused himself.

SUMMARY OF ARGUMENT

This Court should not disturb the Florida Supreme Court's decision in *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997). It is clear that Congress did not intend a uniform interpretation of the Truth-in-Lending Act throughout the fifty states. This is particularly true for the concept of recoupment and its applicability to the right of rescission. The Florida Supreme Court decided an issue of Florida law. Since Congress left the decision to individual states, this Court has not been presented with an important federal question which it should resolve.

The *Beach* decision is not in conflict with decisions of this Court or any of the United States Courts of Appeal. The statutes interpreted in the cases cited by Petitioner all focus on the time for bringing an action. 15 U.S.C. § 1635(f), however, specifically provides for the expiration of the right of rescission after three years. The Florida Supreme Court properly drew a distinction between statutes which focus upon the time for bringing an action and a statute which provides for the expiration of a right.

Petitioners' efforts to establish a basis for jurisdiction by discussing what they term as legislative history must also fail. The language of the statute should be the first area of focus for any court. Petitioners' assumption that Congress' actions or inactions were based upon specific court decisions, without any reference to the congressional record, does not constitute legislative history. The significance of the amendment to § 1640(e) in 1980, adding recoupment language for damage claims, while not providing for a similar amendment to § 1635(f) was properly recognized by the Florida Supreme Court and should not be ignored as the Petitioners' claim. Certiorari should not be based upon such alleged legislative history.

The Florida Supreme Court properly recognized the rescission remedy, at least in this case, would constitute a penalty. The impact of Great Western's disclosure errors was a $7.24 overstatement of the finance charge. The recovery sought by the Beaches is completely disproportionate to the harm they suffered. Rescission would not be remedial but would be a punishment designed to cause Great Western to comply in the future.

Petitioners have not provided this Court with a basis for certiorari. If this Court were to accept jurisdiction and reverse the Florida Supreme Court, it would be acting in a manner contrary to congressional intent as directly expressed in the statute. For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

ARGUMENT

CONGRESS INTENDED TO PERMIT INDIVIDUAL STATES TO REACH DIFFERENT CONCLUSIONS ON THE APPLICABILITY OF RECOUPMENT TO RESCISSION RIGHTS UNDER THE TRUTH-IN-LENDING ACT

Petitioners seek certiorari to allegedly create harmony between courts of different jurisdictions. Respondent recognizes that the Florida Supreme Court's interpretation of Florida law in *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997) is not in harmony with the decisions of the Colorado Supreme Court, mid-level appellate courts in New York and Illinois and two bankruptcy courts in New Jersey and Massachusetts. Nevertheless, this Court should deny the petition because it is clear Congress did not intend a harmonious interpretation on this issue. Since other courts have not issued an interpretation of Florida law, there is no significant conflict which should concern this Court.

From 1980 to 1995, there was only one provision within TILA concerning recoupment. 15 U.S.C. § 1640(e) provided that any action under that section must be brought within one year from the date of occurrence of

the violation, except that a violation may be raised in an action to collect a debt brought more than one year from the date of occurrence as a matter of defense by recoupment or set-off. Congress specifically permitted states to opt out of that recoupment provision, however, by adding the phrase "except as otherwise provided by state law". Louisiana has opted out, choosing to statutorily deny their citizens this particular recoupment right. La. Code Civ. Proc. Ann. art. 424 (West 1995).

Two years ago, Congress passed the Truth-in-Lending Act Amendments of 1995. Therein, the concept of recoupment was again addressed. In describing new provisions concerning certain rescission rights in foreclosure, Congress, in a subsection entitled "RIGHT OF RECOUPMENT UNDER STATE LAW" stated that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under state law." 15 U.S.C. § 1635(i)(3). Thus, Congress clearly was empowering each state to determine whether recoupment was appropriate for Truth-in-Lending Act rescission claims. Since Congress recognized this as an issue which could be dealt with by individual states, this Court should not disturb the determination by Florida's highest court that recoupment is inappropriate under the circumstances of this case.

Congress' intent to allow states to independently reach different conclusions is made even clearer by examining 15 U.S.C. § 1635(i)(1) and (2) (also added by the 1995 amendments). If Congress intended to uniformly permit borrowers to raise rescission defensively beyond the three (3) year expiration of the right to rescind, as Petitioners argue, it clearly would not have subjected the newly created rescission rights in foreclosure, embodied

in subparagraphs 1 and 2, "to the time period provided in subsection (f)" (15 U.S.C. § 1635(f)). Once again, Congress has made it clear that uniformity in interpreting this statute is not critical and perhaps is not even desired. For the foregoing reasons, certiorari should be denied.

BEACH IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR THE FEDERAL CIRCUITS

Petitioners rely largely on this Court's opinions in *Reiter v. Cooper*, 113 S.Ct. 1213, 507 U.S. 258, 122 L.Ed. 2d 604 (1993) and *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935) and the United States Court of Appeals for the Eleventh Circuit's decision in *In re: Smith*, 737 F.2d 1549 (11th Cir. 1984). Each of those cases recognized the propriety of permitting time barred claims to be raised defensively as a matter of recoupment. The significant distinction, however, is that those three cases dealt with statutes which, on their face, were classic statutes of limitation. They all provided for the bringing of an action within a particular time. Only *In re: Smith* dealt with the Truth-in-Lending Act and it specifically focused on the damage provision referenced above (§ 1640(e)).

Significantly, *In re: Smith* did not reach the conclusion that TILA claims are subject to recoupment. Since Ms. Smith was actually seeking affirmative relief and could not meet the other prongs of the *Bull v. United States* test, the court chose not to decide whether a defensive TILA claim is more in the nature of a set-off or a recoupment. Petitioners' heavy reliance on *In re: Smith* is misplaced.

A significant distinction must be drawn between the statutes analyzed in *Reiter v. Cooper*, *Bull v. United States*

and *In re: Smith*, and 15 U.S.C. § 1635(f). Section 1635(f) states: "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor, . . . " The language specifically focuses on the expiration of the right to rescind. There is nothing ambiguous about that language.

Expiration is defined as: termination for mere lapse of time; coming to close; termination or end. Black's Law Dictionary 519 (5th Ed. 1979). The mandatory expiration of the right after three years is reiterated in 12 C.F.R. § 226.23(a)(3) and reinforced in paragraph 23(a)(3)-3 of the Official Staff Commentary which states:

> 3. Unexpired Right of Rescission. When the creditor has failed to take the action necessary to start the three (3) business day rescission period running, the right to rescind automatically *lapses* on the occurrence of the earliest of the following three events:
>
> • The expiration of three (3) years after consummation of the transaction. . . .

(emphasis added). Lapse is defined: "to become void through lack of attention." The New Lexicon Webster's Dictionary of the English Language 556 (Encyclopedic Ed. 1987).

Like Florida's courts, this Court has recognized that a court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984). That intent is reemphasized by the language of Regulation Z and the Official Staff Commentary which is binding on the courts unless demonstrably irrational. *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980).

Notwithstanding Petitioners' argument to the contrary, the *Beach* opinion is consistent with *Reiter v. Cooper*, *Bull v. United States*, and *In re: Smith*, because it takes into consideration Congress' and the Federal Reserve Board's specific language which reference the expiration of the right of rescission and the lapse of the right to rescind. If this Court accepts jurisdiction and reverses the Florida Supreme Court, it must ignore the specific language chosen by Congress and the Federal Reserve Board in limiting the right to rescind as opposed to limiting actions to seek the remedy of rescission. It must also ignore the distinct difference between the language used in § 1635(f) and the language used in § 1640(e). As a general rule, "[w]here Congress includes particular language in one section of a statute but omits it another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed. 2d 17 (1983). This Court should not render part of the Truth-in-Lending Act meaningless by interpreting § 1635(f) as a statute of limitation rather than an express direction that the right itself expires and cannot be revived after three (3) years have passed.

Petitioners insist that this Court in *Reiter v. Cooper*, adopted *In re: Smith* and somehow has by such action, embraced *In re: Smith* as providing for recoupment in connection with truth-in-lending rescission claims. First,

it is clear that this Court in *Reiter v. Cooper* was simply recognizing that the Eleventh Circuit, in *In re: Smith*, understood that this Court's holding in *United States v. Western Pacific R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed. 2d 126 (1956), constituted a general principle of recoupment which was applicable in other contexts. While it is perhaps possible to consider the language of *Reiter v. Cooper* as an implicit adoption of the *In re: Smith* holding, it is impossible to conclude that *Reiter v. Cooper*, through its reference to *In re: Smith*, concluded that recoupment is applicable to § 1635(f)'s expiration of the right to rescind. *In re: Smith*, which did not even conclude that recoupment was otherwise applicable to § 1640 claims, certainly does not stand for that proposition.

Respondent does not dispute Petitioners' conclusion that a defense is not an action. If § 1635(f), like § 1640(e), required that an action be filed within a specific period of time, then recoupment would likely be appropriate. Petitioners' distinction between an action and a defense provides this Court with the precise information it needs to understand why *Bull v. United States*, *Reiter v. Cooper* and *In re: Smith* and the other federal cases cited by Petitioners are inapplicable and therefore do not conflict with *Beach*. While each of those cases dealt with the applicability of recoupment to classic statutes of limitation, which limit the time for bringing an action, § 1635(f) could not, in a clearer manner, show Congress' intent that the right of rescission expires. As this Court at least inferred in *Western Pacific*, 352 U.S. 59, 72, clear Congressional language can limit the applicability of recoupment. By providing for the expiration of the right, Congress did not focus on the bringing of an action and therefore made

the three year period absolute whether rescission is sought affirmatively or defensively. Petitioners cannot claim that they have not sought to enforce a right of rescission well beyond the three year time frame set forth in § 1635(f). The Florida Supreme Court's analysis on this point should not be disturbed.

Petitioners incorrectly assert that *Beach* is in conflict with *James v. Home Construction of Mobile*, 621 F.2d 727 (5th Cir. 1980). While the *James* court did attack the distinction between statutorily created rights and common law rights, the court's main focus was on establishing congressional intent. Since § 1635(f) was a substantive amendment and Congress did not indicate an intention to apply that provision retroactively, the court held that its impact should only be applied prospectively. *Beach* similarly sought to determine Congressional intent.

Notwithstanding Petitioners' argument to the contrary, the significance of a statute which both creates a right and places time restrictions on that right is still recognized by the federal courts. In *Sarfati v. Wood Holly Associates*, 874 F.2d 1523 (11th Cir. 1989), the court recognized that Congress had extended the limitation period on claims under the Interstate Land Sales Full Disclosure Act from two (2) years to three (3) years shortly after the Sarfatis' cause of action had accrued. The *Sarfati* court recognized that a statute of limitations that restricts a right created by statute rather than a right at common law, generally is deemed to be a substantive limit on the right as opposed to a mere procedural limit on the remedy [citations omitted]. *Sarfati*, 874 F.2d at 1525. Since the limitation was on the right rather than the remedy, the court held that the amendment did not apply to causes of

action already in existence on its effective date. Thus, despite the language in *James v. Home Construction of Mobile*, 621 F.2d 727, the Eleventh Circuit has more recently recognized limitations on the right rather than the remedy where they are created statutorily and appear in the same statute. *See also, Lujan v. Regents of University of California*, 69 F.3d 1511 (10th Cir. 1995) (where a statute of limitation does not merely bar the remedy for the violation of a right but limits or conditions the right itself, courts have treated the statute as substantive). While these cases talk of statutes of limitation, and *Beach* considered § 1635(f) to mirror a statute of repose, the key focus is on the limitation of the right rather than the action.

PETITIONERS HAVE NOT PROVIDED THIS COURT WITH LEGISLATIVE HISTORY WHICH JUSTIFIES IN ANY WAY THE GRANTING OF CERTIORARI

The Petitioners' review of legislative history is misplaced and clearly irrelevant to the question presently before the Court. Congress passed the Truth-in-Lending Simplification and Reform Act in 1980, substantially overhauling TILA. *Beach* properly recognized the significance of Congress' choice to amend § 1640(e) (which provided for the bringing of an action within one year) by adding particular recoupment language while failing to add similar language to § 1635(f). Petitioners failed to mention that § 1635(f) was amended as well in 1980, to extend the right to rescind if an enforcing agency institutes a proceeding to enforce the provisions of the Truth-in-Lending Act within three (3) years after the date of consummation, finds a violation, and the obligor's right to rescind is based in whole or in part on any matter involved in such

proceeding provided the action is brought within one (1) year following the conclusion of the enforcing agency's proceeding.

Petitioners treat the language of § 1635(f) as if the three (3) year time frame should simply be ignored. The objective of the amendment adding § 1635(f) was "to limit the time the right of rescission may run". December 1972 Report of the National Commission on Consumer Finance, Page 190. If Congress were only concerned with barring rescission claims once a borrower sells his home, they could have easily limited § 1635(f) to that purpose.

TILA RESCISSION IS NOT EQUITABLE

The conclusion reached in *Beach* that TILA rescission is a penalty, is consistent with the holding in *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992). The focus of the *Williams'* court was on the appropriateness of permitting equitable modification to the harsh consequences of rescission. Jurisdiction should not be invoked to further analyze the penal nature of the rescission right.

Clearly, the purpose for rescission is to address both individual wrongs and wrongs to the public. The Beaches have argued on numerous occasions throughout the stages of this litigation, that the Act imposes a system of strict liability. *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371 (11th Cir. 1984). Relying on *In re: Porter*, 961 F.2d 1066, 1078 (3rd Cir. 1992), the Beaches have asserted that the intent of the lender and the knowledge and reliance of the borrower on the disclosures are irrelevant in determining whether to permit the consumer to rescind. The

Act contemplates the creation of a system of private attorneys general to protect consumers generally and avoid the need for a large enforcement bureaucracy. The statutory rescission remedy, which is far more costly than actual or statutory damages (particularly if post-expiration relief is permitted) is a part of that system and is designed to generate overall compliance by lenders.

While it is true that the recovery will run to the individual rather than the public, it is difficult to see how the recovery is anything but disproportionate to the harm suffered. Simply because one purpose of the remedy is to allegedly restore the parties to the status quo ante, does not change the clear fact that the recovery is unrelated to the harm. In fact, proof of any harm is irrelevant. It does not matter whether the disclosure error relates to the failure to include a material term (like APR) on the disclosure statement, involves the miscalculation of the finance charge by as little as $10.01 (since the relevant tolerance for this case was $10.00) or millions of dollars, or alternatively, relates to the complete failure to provide any disclosures to the borrower. In each circumstance, the remedy is precisely the same. It does not matter whether the borrowers engaged in credit shopping or would have sought the loan from another lender if the disclosures were perfect. It does not matter whether the borrower has sought and recovered actual damages. The objective is to punish the lender to encourage future compliance by that lender and all others in the marketplace.

One need only to consider the facts of the instant case to determine that rescission is not remedial. The only violations found by the court below related to an incorrect calculation which led to an overstatement of the

finance charge (which in accordance with the 1995 amendments and *In re: Ramsey*, 176 B.R. 183 (9th Cir. BAP 1994) does not constitute a violation) and the alleged misdisclosure of the intangible tax, with the final result being that the finance charge was overstated by $7.24. Petitioners cannot be heard to complain that had they credit shopped they would have chosen another lender once they knew the "true credit terms". Thus, there is no harm to the Beaches to be remedied by permitting rescission. Clearly, the intent, in a circumstance like the one existing in this case, if the claim had been brought before the right to rescind had expired, would be to punish Great Western, for not precisely calculating the figures which were disclosed, through a windfall being awarded to the Beaches as an enforcement tool to generally benefit the public.

In fact, the remedy does not really restore the parties to the status quo. What the Beaches essentially seek is an interest free loan from the date of consummation to the date they are successful on their truth-in-lending rescission claim. The lender, at best, will only recover an amount which is, in fact, less than the principal it originally disbursed.

Throughout their petition, the Beaches imply that Great Western somehow acted in bad faith and profited from the alleged misdisclosures. As referenced above, that inference is simply not true. Great Western's overdisclosure was never shown to be intentional and did not harm the Beaches in any fashion. The Petitioners' argument that shielding creditors after three (3) years will result in other creditors intentionally violating TILA, is absurd and should be directed to Congress. Creditors will

continue to be monitored by the Federal Reserve Board and various enforcement agencies in states in which they lend funds. Additionally, they will be subject to truth-in-lending damage claims and timely raised rescission claims. Since the percentage of loans in default is small, and the percentage of defaulting borrowers who raise truth-in-lending rescission rights is even smaller, it is improbable to assume that lenders will stop complying with TILA based on the *Beach* decision.

CONCLUSION

Clearly, this is not an issue requiring resolution by this Court. Congress has intentionally permitted states to act independently in their enforcement of the Truth-in-Lending Act. This is particularly true with the concept of recoupment. The question answered by the Florida Supreme Court concerned Florida law. It properly analyzed the language used by Congress in determining that the expiration of the right to rescind was a meaningful concept rather than imprecise language which was

intended to bar only actions rather than defenses. The Petition for Writ of Certiorari should be denied.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Florida

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. When a creditor violates the Federal Truth in Lending Act leading to a consumer's 15 U.S.C. §1635 extended right to rescind, can the consumer raise his statutorily created right to rescind as a defense to the creditor's foreclosure suit by recoupment after the §1635(f) 3 year limit expires as allowed by this Court, the Federal Circuit Courts and State Courts of last resort, or can the creditor escape the consequences of a §1635 rescission when he sues to foreclose the mortgage after §1635(f)'s 3 year limit expires on the theory that the right to rescind is a statutorily created right that expires after 3 years as held by Florida's Supreme Court?

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PREFACE-ABBREVIATIONS USED

Petitioners will use the following abbreviations in the brief;

TIL ..... 15 U.S.C. 1601, et.seq., Federal Truth In Lending Act

§1601 ..... Specific section of 15 U.S.C. 1601, et.seq.,

TIL ..... Pre-1980 15 U.S.C. 1601, et seq.

new TIL ..... TILA after the Simplification and Reform Act of 1980

FRB ..... The Federal Reserve Board

Reg Z ..... 12 C.F.R. 226.01,

O.S.C ..... Official Staff Commentary to Reg. Z issued by the FRB

APR ..... Annual Percentage Rate of Interest under 15 U.S.C. 1606 & 1638(a)(4)

FC ..... Finance Charge under 15 U.S.C.1605 & 1638(a)(3)

AF ..... Amount Financed under 15 U.S.C.1638(a)(2)(A)

IAF ..... Itemization of Amount Financed under 15 U.S.C.1638 (a)(2)(B)

Petitioner will refer to DAVID R. BEACH and LINDA M. BEACH, his wife, Petitioners, as "the Beaches" and GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS, as "GW".

STATEMENT OF FACTS AND CASE

Great Western seeks to minimize all the errors found by the trial court and affirmed through the Florida Supreme Court's opinion: GW overstated the monthly payment by $00.58 a §1638(a)(6) violation, and the corresponding total of payments by $201.84 a §1638(a)(5) violation. The payment error resulted in a misstated finance charge, amount financed, and annual percentage rate, which violates §1638(a)(3),(4)&(5). The trial court then found GW wrongly disclosed the finance charge, the amount financed and corresponding annual percentage rate by Florida's intangible tax. The trial court also found GW erred by the use of estimated disclosures [See trial opinion, App. to Initial Brief 1, p. 8-11, 12, 14]. These findings were affirmed through the Florida Supreme Court.

REPLY ARGUMENTS SUPPORTING REASONS FOR GRANTING THE WRIT

GW agrees all other state courts conflict with Beach v. Great Western Bank 22 Fla.L.WK.S71 (Fla.1997) interpretation of §1635(f). GW argues Congress intended states to control whether rescission is available as a defense by recoupment for a federal right evidenced by a 1995 TIL amendment. GW then reasons the Court should not grant certiorari to create harmony because Congress intended disharmony. The argument may have superficial appeal but lacks support in reason after close examination.

GW p.5 cites §1640(e)[1980] which allows recoupment "except as otherwise provided by state law" and claims this is a state "opt out" clause. The Beaches disagree §1640(e) allows states to opt out of §1640(e) recoupment. However, if it is an opt out clause Beach's rules of statutory construction, which mirror this Court's rules, prohibit and reject GW's argument.

GW reasons Congress used the phrase "except as otherwise provided by state law" to evidence its intent to allow states to decide to allow damages after §1640(e)'s one year limit. GW then cites a different phrase in §1635(i)(3) to argue Congress had the same intent. Beach's p.73 rules of statutory construction, reject GW's "opt out" same intent by a different clause argument:

> "[w]here Congress includes particular language in one section of a statute but omits it in another section of a statute, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusions or exclusions." Id. p.73
>
> "[w]hen the legislature has used a term ... in one section of a statute but omits it in another section of the same statute, we will not imply it where it has been excluded." Id., p.73

GW argues Congress included the particular §1640(e) language

"except as otherwise provided by state law" to evidence its intent to allow individual states to opt out of post limit recoupment. Congress omitted the "except as otherwise provided" language from §1635(i)(3)'s phrase "recoupment under state law". Beach and this Court holds it is generally presumed Congress acted intentionally and purposely in the disparate inclusion of "except as otherwise provided" in §1640(e)[1980] and its exclusion from §1635(i)(3)[1995]. Beach and this Court bar a Court from implying Congress intended §1635(i)(3)[1995]'s "recoupment under state law" phrase really meant "except as otherwise provided by state law" where Congress specifically excluded the §1640(e)[1980] phrase from §1635(i)(3)[1995]. Beach and this Court reject GW's argument that §1635(i)(3)[1995] is a state "opt out" phrase like §1640(e)[1980].

Beach fn 6 refused to address the 1995 TIL amendments because they did not apply to the facts. GW tries to overcome this flaw in its argument by citing §1635(i)(1-2)'s phrase "subject to the time period provided in [§1635(f)]" to argue Congress intended to allow each state "opt out" rights. GW does not explain how this phrase evidences Congress' intent to allow states to opt out. GW cannot explain this because the §1635(i)(1-2) phrase shows Congress never intended §1635(f) to act as a statute of repose to bar affirmative defenses by recoupment for any state.

Congress passed the 1995 TIL amendments largely to protect the lending industry from potential billion dollar liability for Rodash v. AIB Mortgage Corp., 16 F.3d 1142 (11th Cir. 1994) rescission class actions [see Remarks by Rep. Roukema, Cong.Rec.H. 9514, Sept.

27, 1995, Smith v. Highland Bank, 108 F.3d 1325 (11th Cir. 1997), affirming Smith v. Highland Bank 915 F.Supp.281, p.293,294, fn.7,8 (D.Ala. 1996) and end confusion in re Porter 961 F.2d 1064 (3rd Cir. 1992) created over the rescission form by forcing lenders to use FRB approved forms. In order to get retroactive immunity for Porter and Rodash suits at §1605(f)[1995] and §1649[1995] lenders had to accept Congress' grant to consumers of §1635(i)'s limited right to rescind defensively as a compromise to: 1) protect lenders from billion dollar class rescission suits; 2) protect individual consumers in default by letting them rescind for the same errors barred as class claims; 3) allow some defensive rescission after §1635(f)'s 3 year limit expired for the individual consumer; & 4) compel use of standard FRB rescission forms. see proposed and rejected March, 1995 Bill [§7 "Limitation of Liability" absolutely ended rescissio after 3 years], Remarks of Rep. Leach, Cong. Rec. H. 9514 Sept. 27, 1995, Remarks of Rep. Gonzalez, Cong. Rec. H. 9515 Sept.27, 1995, Remarks of Sen. Sarbanes, Remarks of Sen. D'Amato Cong. Rec. S. 14567 Sept. 28, 1995.

§1635(i) does not create opt out rights but affirms Congress' intent to allow post limit rescission by creating a defense not an action. Under Beach's adoption of the Federal statute of repose definition, §1635(f)&(i) must create a new liability and give an action to enforce the right unknown at common law, and fix the time within which the action may be commenced as an indispensable condition of the liability and the action which it permits. §1635(i) did not create a new TIL rescission liability and an action to enforce

it. §1635 (i)(1-2)[1995] created new rescission rules and did not give the consumers an action to enforce the rules. §1635(i)(1-2) only gave consumers a defense after a creditor initiates a judicial or non-judicial foreclosure, and for limited circumstances.

A defense is not an action. They are two diametrically opposed legal concepts. see **Black's Law Dictionary**, 6th Ed.: p.28 Action as opposed to p.419 Defense. Since §1635(i)(1-2)[1995] only creates a defense, §1635(f) cannot fix the time to bring "an action" under §1635(i). §1635(f)'s 3 years adopted at §1635(i)(1-2)[1995] cannot be an indispensable condition of liability or the action when §1635 (i)(1-2) only created a defense after a consumer is in foreclosure, thereby making §1635(i) outside the Beach and Federal statute of repose definition.

Federal Law rejects GW's argument because under Federal Law, a claim for rescission is not an action but an affirmative defense. Resolution Trust Corp. v. Love, 36 F.3d 972,976 (10th Cir.1994), National Union Fire Ins. Co. v. City Sav., 28 F.3d 376,393-394 (3rd Cir.1994). Resolution Trust Corp. v. Midwest Federal Sav., 4 F.3d 1490,1495-1497 (9th Cir.1993), Resolution Trust Corp. v. Schonacher 844 F.Supp 689 (D.Kan.1994). National Union p.394, fn 26. broadly interpreted "claim" and found rescission an affirmative defense not a claim under federal law and outside of FIRREA's claim preclusion provision. No logical reason exists to distinguish between TIL and other federal rescission rights since TIL rescission adopted and only re-ordered common law rescission. Williams v. Homestake Mortg. Co., 968 F.2d 1137,1140 (11th Cir.1992).

Distribution Services Ltd. v. Eddie Parker Interests Inc., 897 F.2d 811,813-814 (5th Cir.1990) specifically rejects the statute of repose/statute of limitation dichotomy for statutory rights when raised as an affirmative defense for Federal Law. GW's argument not only lacks support under logical analysis, but conflicts with Eddie Parker, 813-814, National Union p.394, fn 26, Midwest, Love, and Schonacher. Federal Law recognizes rescission is only a defense, so Congress always intended §1635 rescission rights to be available as a defense after 3 years expires. Congress made its intent clear in §1635(i)[1995] because Congress did not make the new defense an action and outside of Beach's definition of a statute of repose.

Beach, adopted this Court's rules of statutory construction This Court prohibits reading "action" into §1635(i)[1995] because Congress specifically used "action" to describe damage suits throughout §1640 but declined to use "action" to describe the right to rescind in §1635(f) and §1635(i) before and after the 1995 amendments. It is generally presumed Congress acted intentionally and purposely in the disparate inclusion of "action" throughout §1640 and exclusion of "action" from §1635(f)&(i). Beach and this Court prohibit a Court from implying Congress intended §1635(f)&(i) rescission as an "action" where Congress excluded "action" from §1635(f)&(i). Beach and this Court reject interpreting §1635 as an "action" as argued by GW. Congress had to intend §1635(f)&(i) as an affirmative defense before and after 1995.

Love p.976 and National Union p. 393-394 clearly distinguish between an "action" barred by repose and rescission affirmative

defenses not barred by "repose" for recoupment. "Action", the linchpin for Beach's rationale, depended heavily on Devlin v. Aetna Finance Co., 379 So.2d 972 (Fla.5 DCA 1979), cert.den.389 So.2d 1108 (Fla.1980). However, §1635 and specifically §1635(i)[1995] did not create an "action". Since §1635(f) and §1635(i)[1995] did not create an "action" Congress must have intended to allow rescission as an affirmative defense and so available in recoupment for all states. §1635(i)[1995] does not support GW's argument that Congress allowed each state to deal with rescission after 3 years.

GW argues Beach agrees with Reiter v. Cooper, 113 S.Ct 1213, 1218 507 U.S. 258, 122 L.Ed2 604(1993), Bull v. United States, 295 U.S. 247,262 55 S.Ct. 695,700 79 L.Ed. 1421(1935) and United States v. Western Pacific R. Co., 352 U.S.59,71 77 S.Ct.161,169, 1 L.Ed.2d 126 (1956) because Beach pays homage to the FRB's interpretation of §1635(f) as statute of repose in Reg Z 226.23(a) under this Court's rules of statutory construction. GW overlooks the fact that §1640 used "action" while §1635 declined to use action. Beach generally presumed Congress acted intentionally and purposely by including "action" in §1640 and excluding "action" from §1635. GW agrees this Court prohibits implying Congress intended §1635 rescission as an "action" where Congress excluded "action" from §1635. GW must agree that Beach conflicts with Russello v. United States, 464 U.S. 16, 23, 104 S.Ct.296,300 78 L.Ed.2d 17 (1983) because Beach wrongly equates a §1640 "action" with a §1635(f) rescission defense.

GW then tries to distinguish Reiter, Bull and Western Pacific, by arguing §1635(f)'s "statute of repose" is different from Reiter,

Bull and Western Pacific's statutes of repose. Notably absent from GW's argument is a case that describes any Federal statutory action allowed as a defense after the repose expires in the cases cited by Beach's initial brief as anything but a classic "statute of repose" under Federal Law. GW really argues that Reiter, Bull and Western Pacific deal with a statute of repose not barred defensively, while §1635(f) is a different statute of repose which is forever barred. The argument has several flaws.

James v. Home Construction of Mobile, 621 F.2d 727 (5th Cir. 1980) already considered and rejected the argument so GW's argument conflicts with James. Although GW agrees James conflicts with the Beach §1635(f) statute of repose reasoning, GW tries to distinguish James by arguing James and Beach only tried to determine Congress' intent. GW overlooks the fact that they both attempted to interpret intent for the same §1635(f) and arrived at diametrically opposite results. Thus GW agrees conflict exists between Beach's and James' interpretation of Congressional intent as to §1635(f) for which this Court has an express grant of jurisdiction.

GW then cites 2 post-James cases to argue the 11th Circuit recently affirmed the statute of repose concept, thus implying the 11th has receded from James. However, much like the Eddie Parker, p. 813-814 argument, GW's 2 cases only deal with the right to bring a suit. As anticipated in the Beach initial brief, GW cannot cite 1 federal case that holds a defendant cannot raise a repose barred federal statutory action as a defense to the Plaintiff's claim. GW really asks this Court to establish one form of statutes of repose

for §1635(f) suits and a different set for the remaining Federal statutes of repose, which James already rejected.

GW did not refute the Beaches legislative history of §1640 compared to §1635 except to say it was not relevant to certiorari. The fact Congress added a regulatory enforcement extension does not show Congress intended to address a non-existent post 3 year limit problem in 1980 by not adding a §1640(e) recoupment phrase. GW then cites the December 1972 Report of the Nat. Commission on Consumer Finance to argue Congress intended to limit all rescission rights to 3 years. If it intended otherwise, it could have said so.

The Beaches properly argued Congress, the National Commission on Consumer Finance and the 1972 Annual Report to Congress on TILA by the Board of Governors of the Federal Reserve System were only concerned with title clouds after a sale of property and not an absolute limit of 3 years. The National Commission and 1972 Annual Report arrived at 3 years only to uniformly terminate the right to clear up title problems because different states may have different rules regarding when title passes. For example a contract for deed in some states may not meet TIL's definition for a "sale" and so cloud titles in some states for many years until title actually passes. Congress added 3 years to end the right only to clear title for uniformity and GW can cite no other purpose for the 3 years.

GW cannot refute the argument that Congress did not originally concern itself with the effects of rescission after 359 payments of a 30 year mortgage. GW cannot cite one case, other than Beach to argue Congress intended rescission as a penalty. All other cases,

as cited in Beach's initial brief, hold the right to rescind is an equitable right designed to allow consumers 3 days to think whether to encumber and risk their home to foreclosure based on the terms disclosed with the remedy designed to cancel a loan based on wrong disclosures and restore the parties to the pre-closing status quo. Williams, p.1140-1142 (11th Cir.1992), Porter, p.1074, Rodash, p. 1145, Federal Deposit Ins. Corp. v. Hughes, 684 F.Supp 616,622-623 (D.Minn.1988), aff'd Federal Deposit Ins. Corp. v. Hughes 938 F.2d 889 (8th Cir.1991).

GW bolsters its argument by claiming the Court held it liable for a small $7.24 error which should exonerate GW from liability. GW ignores the fact that the trial court found GW wrongly disclosed the finance charge, the amount financed and corresponding annual percentage rate by Florida's intangible tax, the payment schedule by $.58, corresponding total of payments, and the use of estimated disclosures' [See trial opinion, App. to Initial Brief 1, p. 8-11, 12, 14], all affirmed on appeal. see Beach v. Great Western Bank 670 So.2d 986,993, fn 4 (Fla.4 DCA 1997), aff'd at Beach, p.71.

Notwithstanding the fact that the trial court found a myriad of TIL errors, GW seeks to minimize the errors to argue it is the sympathetic party wronged by a clever consumer who strategically defaulted. GW essentially argues this Court should interpret TIL broadly in favor of creditors to protect them from unsympathetic sophisticated consumers. Every case rejects GW's arguments. Semar v. Platte Valley Fed. Sav.& Loan, 791 F.2d 699,704 (9th Cir.1986), Shroder v. Suburban Coastal Corp., 729 F.2d 1371 (11th Cir. 1984)

[TIL liability in favor of paralegal].

CONCLUSION

The Beaches respectfully submit Certiorari should be granted to resolve the express and direct conflict between the Florida Supreme Court's decision that pays homage to the statutory created right and statute of repose doctrine for recoupment. When creditors violate the Federal Truth in Lending Act leading to a consumer's 15 U.S.C. §1635 extended right to rescind, this Court should treat the federally created right identical to all other federally created rights. The defendant can raise his statutorily created right as a defense to the suit by recoupment after the §1635(f) 3 year limit expires as allowed by this Court, the Federal Circuit Courts and State Courts of last resort. This Court should affirm its long standing rule that refuses to reward Plaintiffs and make them responsible for the consequences of their wrongdoing by allowing defendants to defend by time barred claims, and put to an end the statutorily created right, statute of repose, statute of limitation dichotomy for federal claims.

Respectfully Submitted,

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SUPREME COURT NO.:97-5310

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS

Respondents

CERTIFICATE OF SERVICE-REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I HEREBY CERTIFY that a true and accurate copy of the enclosed Reply Brief has been furnished on each of the parties and all persons required to be served with said documents by depositing an envelope, including a copy of all the documents, properly addressed in the U.S. Mail first class postage prepaid to: STEVEN ELLISON, ESQ., Broad and Cassel, P.A., 5th Floor Reflections Building, 400 Australian Ave. So. West Palm Beach, Fla. 33401, attorneys for Respondent, on this 3rd day of September, 1997

By

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Supreme Court, U.S.
FILED
NOV 26 1997
CLERK

No. 97-5310

In The

Supreme Court of the United States

October Term, 1997

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Petitioners,

vs.

OCWEN FEDERAL BANK,

Respondent.

JOINT APPENDIX

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Petition For Certiorari Filed July 21, 1997
Certiorari Granted October 14, 1997

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CIRCUIT DIVISION PROGRESS DOCKET
11/20/97 02:09 PM STATUS: REDISPOSED
DIVISION: AG – KATHLEEN J. KROLL

TYPE CASE: 07 – R/P AND FRCLSUR

****

GREAT WESTERN BANK FKA GREAT WESTERN SAVINGS

- VS -

BEACH, DAVID R

****

ALL PARTIES IN CASE

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REP BY: ELLISON, ESQ., STEVEN 051031
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WEST PALM BEACH FL 3340

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PO BOX 1489 BOYNTON BEACH FL 3342

DEFENDANT
BEACH, LINDA M 094333
REP BY: BAKST, ESQ, DANIEL LLOYD 000309
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SET-N-SUN OWNER'S ASSOCIATION, INC 021689

DEFENDANT
UNITED STATES OF AMERICA 010070
% UNITED STATES ATTORNEY
99 N E 4TH STREET MIAMI FL 3313

PLAINTIFF
OCWEN FEDERAL BANK 032503

010101 0000

**********DEFAULT ENTERED**********

060892 0001

COMPLAINT
JR-NOJR/CT-NOCT N
W/ATTACHMENTS

060892 0002

LIS PENDENS
BOOK/PAGE 07275 00847

060892 0003

CIVIL COVER SHEET

060892 0004

SUMMONS ISSUED
PARTY NAME BEACH, DAVID R
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

060892 0005

SUMMONS ISSUED
PARTY NAME BEACH, LINDA M
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

060892 0006

SUMMONS ISSUED
PARTY NAME BENEFICIAL
MORTGAGE CO OF FLORIDA
COUNTER
SUMMONS SERVED
DATE SERVED 06/17/92
RETURNED 062292

060892 0007

SUMMONS ISSUED
PARTY NAME
SET-N-SUN OWNER'S
ASSOCIATION, INC
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

060892 0008

SUMMONS ISSUED
PARTY NAME UNITED STATES OF
AMERICA
COUNTER
SUMMONS SERVED
DATE SERVED 06/15/92
RETURNED 061892

060892 0009

SUMMONS ISSUED
(FOR PARTIES W/O NAME
NUMBERS)
JOHN DOE
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

060892 0010

SUMMONS ISSUED
(FOR PARTIES W/O NAME NUMBERS)
JANE DOE
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

063092 0011

ANSWER WITH AFFIRMATIVE DEFENSES
OF DEFTS. DAVID & LINDA BEACH
TO THE COMPLAINT BY JAMES BONFIGLIO

063092 0012

NOTICE OF APPEARANCE
ATTORNEY:
PARTY NAME BEACH, DAVID R
ATTORNEY NAME
BONFIGLIO, JAMES ANTHONY
& DEFT. LINDA BEACH BY
JAMES BONFIGLIO

063092 0013

AFFIRMATIVE DEFENSES
OF DEFTS. DAVID & LINDA BEACH

070792 0014

ANSWER
PARTY NAME
BENEFICIAL MORTGAGE CO OF FLORIDA
TO THE COMPLAINT BY JOSEPH STILL

072092 0015

REPLY TO AFFIRMATIVE DEFENSES
PARTY NAME
GREAT WESTERN BANK FKA
GREAT WESTERN
OF PLTF TO DEFTS BY
PETER M ARMOLD
W/ATTACHMENTS

080692 0016

STIPULATION/ORDER
THAT BROAD AND CASSEL IS SUBSTITUTED AS COUNSEL FOR GREAT WESTERN BANK, ETC. IN PLACE OF GARY, DYTRYCH, ETC. DTD. 8/5/92 SAR

102792 0017

NOTICE
OF DEFTS. OF SERVICE OF INTERROGS TO PLTF.

102792 0018

REQUEST
OF DEFTS. TO PRODUCE

110292 0019

MOTION
OF DEFT FOR ENTRY OF PARTIAL SUMMARY JUDGMENT

112092 0021

NOTICE
OF DEFTS. TO PLACE HEARING ON MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT ON NEXT AVAILABLE DOCKET

112492 0021

OBJECTION TO
OF PLTFS. TO REQUEST TO
PRODUCE PROPOUNDED UPON
PLTF, BY DEFTS.

120992 022

NOTICE OF HEARING
HEARING DATE/TIME 12/15/92
08:45 AM
PLTFS OBJECTIONS TO REQUEST TO
PRODUCE PROPOUNDED UPON
PLTF BY DEFTS

121692 0023

NOTICE OF HEARING
HEARING DATE/TIME 12/15/92
08:45 AM
BEFORE JD/THOMAS E. SHOLTS ON
PLTFS' OBJECTIONS TO REQUEST
TO PRODUCE PROPOUNDED UPON
PLTF BY DEFTS

010793 0024

MOTION
OF DEFTS/BEACH'S TO PREVEN
PLTF ROM TAKING INCONSISTENT
POSITION

011393 0025

RE NOTICE OF HEARING
HEARING DATE/TIME 01/27/93
08:45 AM
IN RE: PLTFS, OBJECTIONS TO
REQUEST TO PRODUCE
PROPOUNDED UPON PLTF. BY
DEFTS.

021893 0026

AFFIRMATIVE DEFENSES
OF DEFTS. DAVID & LINDA BEACH

022293 0028

NOTICE OF FILING
OF PLTF. OF ANSWERS TO
INTERROGS PROPOUNDED BY
DEFTS.

022293 0028

RESPONSE
OF PLTF. TO REQUEST TO
PRODUCE

022693 0029

NOTICE
OF PLTF. OF INTERROGS
PROPOUNDED TO DEFTS.

022693 0030

REQUEST
OF PLTF. DAVID & LINDA BEACH
TO PRODUCE

022693 0031

REQUEST
OF PLTF. FOR ADMISSIONS

030993 0032

RESPONSE
OF DEFTS. TO REQUEST TO
PRODUCE

031693 0033

NO D.E. #--CLERKS ERROR

031693 0034

NO D.E. #--CLERKS ERROR

041693 0035

NOTICE OF FILING
OF PLTF. OF AFFIDAVITS IN OPPOSITION TO DEFTS. MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT AS EXHIBITS ATTACH

042193 0036

MOTION
OF PLTF. FOR PARTIAL SUMMARY JUDGMENT

042793 0037

NOTICE OF HEARING
HEARING DATE/TIME 05/04/93 02:00 PM
IN RE: PLTF. MOTION FOR PARTIAL SUMMARY JUDGMENT

060893 0038

MOTION FOR DEFAULT
PARTY NAME GREAT WESTERN BANK FKA GREAT WESTERN
DENIED AS TO DFTS JOHN & JANE DOE NKA DAVID AND LINDA BEACH - ANSWER FILED *

061093 0039

DEFAULT
PARTY NAME SET-N-SUN OWNER'S ASSOCIATION, INC
PARTY NAME UNITED STATES OF AMERICA
CTA/MJH

062193 0040

NOTICE OF HEARING
HEARING DATE/TIME 07/16/93 02:30 PM
RE: MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT

070293 0041

MOTION/NOTICE TO SET FOR NON JURY TRIAL
PARTY NAME GREAT WESTERN BANK FKA GREAT WESTERN OF PLTF'S (SENT TO JUDGE ON 7/2/93)

071493 0042

ORDER SETTING NON JURY TRIAL
PRETRIAL DATE/TIME 10/08/93 08:45 AM
TRIAL DATE/TIME 10/18/93 00:00 AM
IN ROOM 333
DTD. 7/13/93 TES

071493 0043

NOTICE OF FILING
OF PLTF. OF AFFIDAVIT OF CINDY NEWMAN IN OPPOSITION TO DEFTS. MOTION FOR PARTIAL SUMMARY JUDGMENT WITH EXHIBIT A ATTACHED HERETO

071493 0044

MOTION
OF PLTF. TO AMEND PLTF. REPLY TO DEFTS. DAVID & LINDA BEACH AFFIRMATIVE DEFENSES WITH EXHIBIT A ATTACHED

071493 0045

NOTICE OF HEARING
HEARING DATE/TIME 07/16/93 02:30 PM
IN RE: (SEE DOCKET # 44) (CROSS-NOTICE, SPECIALLY SET)***

071693 0046

ORDER
THAT DEFTS. MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT IS DENIED DTD. 7/16/93 TES

071693 0047

ORDER
GRANTING PLTF. MOTION TO AMEND PLTF. REPLY TO DEFTS. DAVID & LINDA BEACH AFFIRMATIVE DEFENSES DTD. 7/16/93 TES

083093 0048

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100893 0049

PRETRIAL STIPULATION
OF PLTF. & DEFTS.

100893 0050

NOTICE OF TAKING DEPOSITION
OF PLTF. OF RC: FIDELITY FEDERAL SAVINGS BANK & DEBORAH SCHIAVONE ON 10/14/93

101493 0051

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OF PLTF. FOR APPOINTMENT OF COMMISSIONER

101493 0052

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101593 0052A

AGREED ORDER
GRANTING PLTF. MOTION TO APPOINT COMMISSIONER & ANY DULY CERTIFIED COURT REPORTER EMPLOYED WITH PACIFIC COAST COURT REPORTERS IS APPOINTED AS COMMISSIONER FOR TAKING THE DEPO OF JOSEPH GRECO DTD. 10/14/93 TES

101893 0053

EXHIBIT LIST BY CLERK
OF DEFTS. DAVID & LINDA BEACH FOR TRIAL

101993 0054

NOTICE OF FILING
OF PLTF. OF EXHIBIT LIST & WITNESS LIST

102093 0055

NOTICE OF FILING
OF TRIAL CLERK, PLTF AND DEFT'S EXHIBIT LISTS *** PLTFS EXHIBITS 1 - 18 AND DEFTS EXHIBITS 1 - 10 ARE IN A BROWN ENVELOPE IN THE EVIDENCE ROOM ***

102093 0056

DEPOSITION
ORIGINAL, OF JOSEPH GRECO

102593 0057

SUBPOENA ISSUED/SUBPOENA SERVED
DATE SERVED 10/08/93
RC: DEBORAH SCHIAVONE

111793 0058

SUGGESTION OF BANKRUPTCY
PARTY NAME BEACH, DAVID R & DEFT. LINDA BEACH AS TO CASE #93-33829-BKC-PGH BY DANIEL BAKST (STILL PENDING)***

030994 0059

NOTICE OF HEARING
HEARING DATE/TIME 03/18/94 02:00 PM (SPECIALLY SET) IN RE: PLTF. MOTION FOR ENTRY OF FINAL JUDGMENT

032394 0060

FINAL JUDGMENT
AMT OF JUDGMENT 116801.77
BOOK/PAGE 08185 00040
OF FORECLOSURE (NO SALE DATE LISTED)****
DTD. 3/23/94 TES (COPIES MAILED WITH BLANK NOS)***

040494 0061

MOTION
OF PLTF FOR REHEARING (UP 4/5/94)

040594 0062

MOTION
OF DEFTS. DAVID & LINDA BEACH TO TAX ATTY. FEES

041394 0063

NOTICE OF HEARING
HEARING DATE/TIME 04/22/94 09:00 AM
IN RE: DEFT. MOTION FOR ATTY. FEES

041494 0063A

ORDER THAT MOTION FOR REHEARING/RECONSIDERATION IS DENIED DTD 4/14/94 TES
BOOK/PAGE
BOOK/PAGE 08219 01942

041494 0064

NOTICE OF APPEAL
BOOK/PAGE 08217 01782
PARTY NAME BEACH, DAVID R
ATTORNEY NAME BONFIGLIO, JAMES ANTHONY
TO 4DCA – FINAL JUDGMENT RENDERED 3/23/94. (1 PG) APPEAL ALSO INCLUDES LINDA M. BEACH

041594 0065

PD BY PT CK/CASH FOR FILING
NOTICE OF APPEAL
AMT DEPOSITED 55.00
CHECK/RECPT # 00007128
BY JAMES A. BONFIGLIO

PD BY PT CK/CASH FOR C.C. OF
NOTICE OF APPEAL
AMT DEPOSITED 1.15
CHECK/RECPT # 00007128

042194 0066

ACKNOWLEDGMENT FROM 4TH DCA
APPEAL FILED 4/14/94 GIVEN
CASE NO. 94-1049
TRUE COPY OF ORDER FROM 4TH
DCA
APPELLANTS HAVE 15 DAYS TO
FILE A COPY OF THE ORDER
BEING APPEALED

042994 0067

AFFIDAVIT
OF JAMES A. BONFIGLIO IN
SUPPORT OF ATTY FEES

042994 0068

FINAL JUDGMENT
BOOK/PAGE 08241 00375
THAT JAMES A. BONFIGLIO P.A. AS
ATTY FOR DAVID R. BEACH AND
LINDA M. BEACH HIS WIFE SHALL
HAVE AND RECOVER FROM GREAT
WESTERN BANK A FEDERAL
SAVINGS BANK, UNITED STATES
CORPORATION F/K/A GREAT
WESTERN SAVINGS THE SUM OF
$10,206.20 FOR ALL OF WHICH LET
EXECUTION ISSUE. DTD 4/29/94
TES
UPDATE/CHANGE OR CORRECT
CASE STATUS ONLY
MANDATORY DATE 05/02/94

053194 0069

NOTICE OF APPEAL
BOOK/PAGE 08287 00097
PARTY NAME GREAT WESTERN
BANK FKA GREAT WESTERN
ATTORNEY NAME ELLISON, ESQ.,
STEVEN
TO 4 DCA – FINAL JUDGMENT ON
ATTY FEES RENDERED 4/29/94.
(1 COPY)

06019 0070

PD BY PT CK/CASH FOR FILING
NOTICE OF APPEAL
AMT DEPOSITED 55.00
CHECK/RECPT # 00000348
BY BROAD & CASSEL
PD BY PT CK/CASH FOR C.C. OF
NOTICE OF APPEAL
AMT DEPOSITED 1.15
CHECK/RECPT # 00000348

060194 0071

TRUE COPY OF ORDER FROM 4TH
DCA
94-1049. TIME TO FILE TRANSCRIPT
EXTENDED TO 6/28/94.
INITIAL BRIEF DUE 30 DAYS FROM
SERVICE OF INDEX

060794 0072

ACKNOWLEDGMENT FROM 4TH DCA
APPEAL FILED 5/31/94 GIVEN
CASE NO. 94-1551
TRUE COPY OF ORDER FROM 4TH
DCA

APPELLANT HAS 15 DAYS TO FILE
A CONFORMED COPY OF THE
ORDER BEING APPEALED

061094 0073

DEPOSITED INTO DEPOSIT/BOND
ACCOUNT
AMT DEPOSITED 11.00
CHECK/RECPT # 00000484
BY BROAD & CASSEL FOR
ESTIMATED COSTS TO PREPARE
RECORD ON APPEAL

062394 0074

TRUE COPY OF ORDER FROM 4TH
DCA
94-1049, 94-1551. APPEALS ARE
NOW CONSOLIDATED FOR
RECORD PURPOSES ONLY

062994 0075

TRANSCRIPT
PROCEEDINGS OF 10/20/93

070694 0076

REQUEST TO PRODUCE
DEFTS., TO PLTF.,
PURSUANT TO FRCP 1.350

070694 0077

NOTICE OF TAKING DEPOSITION
OF DEFT OF OF PLTF ON 7/22/94
AT 11:00 A.M.

070794 0078

DEPOSITED INTO DEPOSIT/BOND
ACCOUNT
AMT DEPOSITED 59.00
CHECK/RECPT # 00007209
BY JAMES A. BONFIGLIO FOR
ESTIMATED COSTS TO PREPARE
RECORD ON APPEAL

071294 0079

STATEMENT FOR PREPARATION OF
RECORD ON APPEAL
94-1049 & 94-1551, 2 VOL., RECORD
PGS 1-117, TRANSCRIPT PGS 1-72
INCL., ONE ENVELOPE, PLTF'S
PORTION, $11.00 DFT'S PORTION,
$59.00
COPY
INDEX TO RECORD ON APPEAL
REQUEST
TO ACCTING FOR $11.00 & $59.00
(EST COSTS) DEPOSITED TO
PREPARE RECORD, NOW EARNED.
PAID IN FULL

071494 0079A

RETURNED MAIL
TO JOSEPH STILL
(UNDELIVERABLE AS ADDRESSED)

072294 0080

RE-NOTICE OF TAKING DEPOSITION
IN AID OF EXECUTION, OF R/C
GREAT WESTERN ON 7/29/94

072694 0081

PD OUT OF DEPOSIT/BOND ACCOUNT
AMT DISBURSED 11.00
CHECK/RECPT # 00003148
TO CLERK FROM ESTIMATED COST TO PREPARE RECORD ON APPEAL PLTF'S PORTION, DEPOSITED 6/10/94 BY BROAD AND CASSEL, NOW EARNED.
PREPARATION OF RECORD ON APPEAL/FEE
AMT DEPOSITED 11.00
CHECK/RECPT # 00003148
4DCA NO. 94-1049 & 94-1551

072694 0082

PD OUT OF DEPOSIT/BOND ACCOUNT
AMT DISBURSED 59.00
CHECK/RECPT # 00003140
TO CLERK FROM ESTIMATED COST TO PREPARE RECORD ON APPEAL DFT'S PORTION, DEPOSITED 7/7/94 BY JAMES A. BONFIGLIO, NOW EARNED.
PREPARATION OF RECORD ON APPEAL/FEE
AMT DEPOSITED 59.00
CHECK/RECPT # 00003140
4DCA NO. 94-1049, 94-1551

072994 0083

RECORDS FORWARDED TO 4TH DCA
94-1049 & 94-1551, TWO VOLUMES, ONE ENVELOPE

080394 0084

RECORDS FORWARDED TO 4TH DCA
4DCA CASE # 94-1049 & 94-1551
TWO VOLUMES, ONE ENVELOPE

080394 0085

RECORDS FORWARDED TO 4TH DCA
4DCA CASE # 94-501
2 FIRST & SECOND SUPPLEMENTAL VOLUMES, 1 ENVELOPE

092194 0086

CHECK-OUT RECEIPT FOR EXHIBITS (IN HOUSE)
PLTFS EXHIBITS 1-18; DEFTS EXHIBITS 1-10 BY KRISTEN PUHALAINEN (J.A.) SIGNED BY JERRY OVERLY (PER PHONE CONVERSATION W/FOURTH DISTRICT ON 1/8/96 EXHIBITS ARE STILL AT FOURTH DISTRICT (ONE ENVELOPE RE: 94-1049 AND ONE ENVELOPE RE: 94-501) ND

013095 0087

TRUE COPY OF ORDER FROM 4TH DCA
94-1551. PER NOTICE OF VOLUNTARY DISMISSAL, APPEAL IS DISMISSED.

020296 0088

TRUE COPY OF ORDER FROM 4TH DCA
ON 1/31/96 RE: 94-01049 GRANTING APPELLEE'S COUNSEL'S MOT FOR ATTY'S FEES & DENYING

APPELLANT'S MOTION FOR ATTY FEES AND COSTS

052096 0089

TRUE COPY OF ORDER FROM 4TH DCA
GRANTING APPELLANTS' 4/24/96 MOTION FOR STAY PENDING SUPREME COURT REVIEW RE: 4DCA CASE NO. 94-1049

042997 0090

TRUE COPY OF ORDER FROM SUPREME COURT
87,835 - 4DCA # 94-1049 - 4/25/97 PETITIONERS' MOTIONS FOR REHEARING AND ATTORNEY FEES ARE DENIED; RESPONDENT'S MOTION FOR ATTORNEY FEES AND COSTS GRANTED

051397 0091

MANDATE FROM APPEALS COURT
94-1049-5/12/97 - OPINION FILED 1/31/96

060297 0092

TRUE COPY OF ORDER FROM SUPREME COURT
87,835 - 4 DCA 94-1049 5/28/97 VACATING MANDATE

060697 0093

RECORD ON APPEAL INDEX. (REASSEMBLED)
94-1049/94-1551

061397 0094

CHECK-IN RECEIPT FOR EXHIBITS (IN-HOUSE)
PLTF'S EVIDENCE RECEIVED BY DOTTIE REMCHUK, ON 6/13/97

072397 0095

NOTICE OF HEARING
HEARING DATE/TIME 07/28/97 08:45 AM
PLTF'S M/TO SET FORECLOSURE SALE

072397 0096

MOTION
OF PLTF, TO SET FORECLOSURE SALE - W/ATTACHMENTS

072897 0097

RE NOTICE OF HEARING
HEARING DATE/TIME 07/31/97 08:45 AM
PLTF'S M/TO SET FORECLOSURE SALE; & PLTF'S M/FOR SUBSTITUTION OF PARTY PLTF

072897 0098

MOTION
OF OCWEN FEDERAL BANK, FOR SUBSTITUTION OR PARTY PLTF - W/ATTACHMENTS

073197 0099

ORDER
THAT PLTFS MOTION FOR SUBSTITUTION OF PARTY PLTF IS GRANTED. OCWEN FEDERAL BANK

SHALL BE SUBSTITUTED AS PARTY PLTF IN THIS CAUSE & SHALL BE ENTITLED TO A CREDIT FOR THE FULL AMOUNT OF GREAT WESTERN BANKS JUDGMENT, PLUS INTEREST WHICH HAS ACCRUED SINCE THE ENTRY OF THE JUDGMENT & COSTS WHICH HAVE BEEN EXPENDED IN CONNECTION WITH THE FORECLOSURE SALE. DTD 7/31/97 KJK

073197 0100

ORDER
ON PLTFS MOTION – RESETTING SALE DATE (TO 9/29/97) 7/31/97 KJK
UPDATE/CHANGE OR CORRECT CASE STATUS ONLY
MANDATORY DATE 08/13/97
MANDATORY DATE 08/13/97

073197 0101

NOTICE OF SALE
MANDATORY DATE 09/29/97
(1) COPY TO PBDBR TO PUBLISH AUGUST 19 & 26, 1997
(2) COPIES TO PTYS

090497 0102

MOTION TO STRIKE
PARTY NAME BEACH, DAVID R & OF DEF, LINDA M BEACH, SALE DATE

090497 0103

NOTICE OF HEARING
HEARING DATE/TIME 09/17/97 08:45 AM
SEE ABOVE MOTION

091697 0104

RE NOTICE OF HEARING
HEARING DATE/TIME 09/18/97 08:45 AM
DEFS M/TO STRIKE SALE DATE

091897 0105

ORDER
DEF'S M/TO STRIKE SALE IS DENIED. DTD 9/18/97 KJK
UPDATE/CHANGE OR CORRECT CASE STATUS ONLY
MANDATORY DATE 09/19/97
MANDATORY DATE 09/19/97

092497 0106

COPY
(FAXED COPY) OF LETTER TO JEFFREY KAUFMAN, ESQ. FROM STEVEN ELLISON, ESQ. ON INTEREST RATE FOR F.J.

092997 0107

PROOF OF PUBLICATION
NOTICE OF SALE

092997 0108

NOTICE OF FILING
AFFIDAVIT OF ADDITIONAL INTEREST & COSTS

092997 00109

AFFIDAVIT
OF ADDITIONAL INTEREST &
COSTS

092997 0110

CLERKS FEE FOR HOLDING SALE
AMT DEPOSITED 40.00
CHECK/RECPT # 00009851
BY STEVEN ELLISON
DEPOSITED INTO DEPOSIT/BOND
ACCOUNT
AMT DEPOSITED .70
CHECK/RECPT # 00009851
BY STEVEN ELLISON FOR DOC
STAMPS

092997 0111

CERTIFICATE OF SALE
PROPERTY SOLD TO PLTF, OCWEN
FEDERAL BANK, FOR $100.00 (1PG)
(COPIES MLD)

101097 0112

CERTIFICATE OF TITLE
BOOK/PAGE 10030 00428
ISSUED TO OCWEN FEDERAL
BANK, (1 PG)
PD OUT OF DEPOSIT/BOND
ACCOUNT FOR DOC STAMPS
AMT DISBURSED .70
CHECK/RECPT # 00000000

101097 0113

CERTIFICATE OF DISBURSEMENT
(PLAINTIFF)

101497 0114

CERTIFICATE OF MAILING

101597 0115

NOTICE OF HEARING
HEARING DATE/TIME 10/16/97
08:45 AM
DEFS EMERGENCY OBJECTION TO
CONFIRM SALE & ISSUE CERT OF
TITLE

101597 0116

OBJECTION TO
(EMERGENCY) OF DEFTS; TO ISSUE
CERT OF TITLE AND
CONFIRMATION OF SALE

101697 0117

ORDER
DEF'S EMERGENCY OBJECTION TO
ISSUE CERT OF TITLE &
CONFIRMATION OF SALE IS
DENIED IF TITLE ISSUED BY
CLERK. (IF NOT ISSUED – 30 DAY
STAY) DTD 10/16/97 KJK
UPDATE/CHANGE OR CORRECT
CASE STATUS ONLY
MANDATORY DATE 10/17/97
MANDATORY DATE 10/17/97

111497 0118

CHECK-OUT RECEIPT FOR EXHIBITS
(IN HOUSE)
EVIDENCE RECEIVED BY CHRISTIE
GOODING, FROM R. JERRY OVERLY,
EVIDENCE CLERK ON 11/13/97

111797 0119

CHECK-IN RECEIPT FOR EXHIBITS (IN-HOUSE)
PLTF'S EVIDENCE 1-18 & DEF'S EVIDENCE 1-10 RECEIVED BY R. JERRY OVERLY ON 11/17/97.

*** END OF DOCKET ENTRIES FOR THIS CASE ***

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION.

CASE NO.: CL 6071 AG

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Plaintiff,

vs. (Filed Jun. 8, 1992)

DAVID R. BEACH; LINDA M. BEACH, his wife; BENEFICIAL MORTGAGE CO. OF FLORIDA; SET-N-SUN OWNER'S ASSOCIATION, INC.; The UNITED STATES OF AMERICA, a Governmental Entity; and JOHN DOE and/or JANE DOE,

Defendants,

_____/

COMPLAINT

Plaintiff, GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS, sues the Defendants DAVID R. BEACH; LINDA M. BEACH, his wife, ("Mortgagors"); BENEFICIAL MORTGAGE CO. OF FLORIDA; SET-N-SUN OWNER'S ASSOCIATION, INC.; The UNITED STATES OF AMERICA, a Governmental Entity; and JOHN DOE and/or JANE DOE, and alleges that:

1. This is an action to foreclose a mortgage on real property in Palm Beach County, Florida.

2. Plaintiff GREAT WESTERN BANK, is a Federal Savings Bank and a United States Corporation authorized to do business in the State of Florida.

3. Defendant, DAVID R. BEACH is an individual over the age of eighteen (18) years, residing in Palm Beach County, not in the military, and otherwise sui juris.

4. Defendant, LINDA M. BEACH is an individual over the age of eighteen (18) years, residing in Palm Beach County, not in the military, and otherwise sui juris.

5. Defendant, BENEFICIAL MORTGAGE CO. OF FLORIDA, is a Corporation duly licensed to do business in the State of Florida.

6. Defendant, SET-N-SUN OWNER'S ASSOCIATION, INC., is a not-for-profit Florida Corporation.

7. Defendant, UNITED STATES OF AMERICA is a proper party to this action pursuant to Title U.S.C. 28 Section 2410.

8. Defendants JOHN DOE and/or JANE DOE are individuals, corporation, or other entities who (which) are occupying the property which is the subject of the complaint, the true and correct names of whom (which) are presently unknown to Plaintiff.

9. That on August 15, 1986, Defendant Mortgagors executed and delivered a Note and a Mortgage securing payment of the Note to GREAT WESTERN SAVINGS n/k/a GREAT WESTERN BANK. The Mortgage was recorded on August 21, 1986, in Official Record Book 4980, at Page 152, of the Public Records of Palm Beach County, Florida, and mortgaged the property described in the Mortgage (the "Property") then owned by and in

possession of the Defendant Mortgagors, a copy of the Mortgage and a copy of the Note being attached hereto and incorporated herein as Exhibit "A".

10. Plaintiff owns and holds the Note and Mortgage.

11. The Property is now owned by Defendant Mortgagors who hold possession.

12. Defendant Mortgagors have defaulted under the Note and Mortgage by failing to pay the payment due December 1, 1991, and all subsequent payments.

13. Plaintiff declares the full amount payable under the Note and Mortgage to be due.

14. Defendant Mortgagors owe Plaintiff $94,678.68 that is due on principal on the Note and Mortgage, interest from November 1, 1991, other expenses, including but not limited to, real estate taxes, escrow deficits, and title search expense for ascertaining necessary parties to this action.

15. Defendant, BENEFICIAL MORTGAGE CO. OF FLORIDA, may claim some interest in the Property by virtue of a Mortgage recorded on August 23, 1990, in Official Record Book 6558, at Page 1030, of the Public Records of Palm Beach County, Florida, but that interest is inferior to that of Plaintiff.

16. Defendant, SET-N-SUN OWNERS' ASSOCIATION, INC., may claim some interest in the Property by virtue of assessments, if any, but that interest is inferior to that of Plaintiff.

17. Defendant UNITED STATES OF AMERICA, may claim some interest in the property by virtue of certain Notices of Federal Tax Liens as follows:

a. Notice of Federal Tax Lien recorded on October 9, 1990, in Official Records Book 6603, at Page 1597 of the Public Records of Palm Beach County, Florida. The name and address of the taxpayer whose liability created the Lien is DAVID R. BEACH, 5870 Set-N-Sun Place, Jupiter, Florida 33458. The Notice of Federal Tax lien was filed by Revenue Officer #65-01-0000 and was prepared and signed at Ft. Lauderdale, Florida on October 2, 1990;

b. Notice of Federal Tax Lien recorded on July 26, 1991, in Official Records Book 6904, at Page 542 of the Public Records of Palm Beach County, Florida. The name and address of the taxpayer whose liability created the Lien is DAVID R. BEACH, 5870 Set-N-Sun Place, Jupiter, Florida 33458. The Notice of Federal Tax Lien was prepared and signed June 23, 1991 at Ft. Lauderdale, Florida; and

c. Notice of Federal Tax Lien recorded on August 20, 1991, in Official Records Book 6936, at Page 549 of the Public Records of Palm Beach County, Florida. The name and address of the taxpayer whose liability created the Lien is DAVID R. BEACH, 5870 Set-N-Sun Place, Jupiter, Florida 33458. The Notice of Federal Tax Lien was filed by Revenue Officer #65-01-3414 and was prepared and signed at Ft. Lauderdale, Florida on August 20, 1991.

Copies of the Notices are attached hereto and incorporated herein as Composite Exhibit "B". The interest of Defendant, UNITED STATES OF AMERICA, is inferior to that of Plaintiff.

18. Defendants JOHN DOE and/or JANE DOE may claim some interest in the Property by virtue of occupancy thereof through oral or written leases or other agreements. Plaintiff is not in possession of any such leases or agreements and does not know the terms thereof. Said interests are inferior to that of Plaintiff.

19. All conditions precedent to the bringing of this action have been fulfilled or waived.

20. Plaintiff is obligated to pay its attorneys a reasonable fee for their services for which Defendant Mortgagors are liable pursuant to the Note and Mortgage.

WHEREFORE, Plaintiff demands an accounting of the sum due to Plaintiff under the Note and Mortgage and if the sum is not paid within the time set by this Court, that the Property be sold to satisfy Plaintiff's claim and if the proceeds of the sale are insufficient to pay Plaintiff's claim, that a deficiency judgment be entered for the sum remaining unpaid against the Defendant Mortgagors and that the estate of the Defendants and all

persons claiming under or against the Defendants since the filing of notice of lis pendens be foreclosed.

GARY, DYTRYCH & RYAN, P.A.
Attorneys for: Plaintiff
701 U.S. Highway One, Ste. 402
North Palm Beach, FL 33408
(407) 844-3700

By: /s/ Peter M. Armold
PETER M. ARMOLD, ESQUIRE
Florida Bar No.: 660655

EXHIBITS OMITTED

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO.: CL 92-6071 AG

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.

_____/

ANSWER TO PLAINTIFF'S COMPLAINT

NOW INTO COURT, through undersigned counsel, come DAVID R. BEACH and LINDA M. BEACH, his wife, and file this their answer and affirmative defenses to Plaintiff's, GREAT WESTERN BANK, complaint to foreclose a mortgage alleging as follows:

1. Admitted for jurisdiction only.
2. Without knowledge therefore denied.
3. Admitted.
4. Admitted.
5. Without knowledge therefore denied.
6. Without knowledge therefore denied.
7. Without knowledge therefore denied.

8. Without knowledge therefore denied.

9. The mortgage and note attached to Plaintiff's complaint and served upon the Defendants is illegible. Therefore, these Defendants can neither admit nor deny.

10. Without knowledge therefore denied.

11. Plaintiffs admit they now own and reside in and have continuously resided in the premises located at 5870 Set-N-Sun Place, Jupiter, Florida 33458.

12. Denied.

13. Denied.

14. Denied.

15. Without knowledge therefore denied.

16. Without knowledge therefore denied.

17. Without knowledge therefore denied.

18. Without knowledge therefore denied.

19. Denied.

20. Without knowledge therefore denied.

WHEREFORE, Defendants pray this Honorable Court dismiss Plaintiff's complaint with prejudice, taxing costs and fees against Plaintiff. Plaintiff's seek costs and fees pursuant to the mortgage and note, and 15 USC 1601, et. seq. and 15 USC 1640.

IT IS HEREBY CERTIFIED that a true and correct copy has been furnished by mail this 26th day of June, 1992, to PETER M. ARMOLD, ESQ., Gary, Dytrych &

Ryan, P.A., 701 U.S. Highway One, Suite 401, North Palm Beach, Florida 33408.

JAMES A. BONFIGLIO, P.A.
189 Bradley Place
Palm Beach, FL 33480
Mail to: P.O. Box 1489
Boynton Beach, FL 33425
(407) 655-1225 or 734 4503

/s/ James A. Bonfiglio
JAMES A. BONFIGLIO, ESQ.
Fla. Bar No. 288055

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA.

CASE NO. CL 92-6071 AG

GREAT WESTERN BANK, etc.

Plaintiff,

vs.

DAVID R. BEACH, LINDA M BEACH, et al.,

Defendants.

AFFIRMATIVE DEFENSES

NOW INTO COURT, through undersigned counsel, come DAVID R. BEACH and LINDA M. BEACH, the defendants herein, and file their affirmative defenses to Plaintiff's complaint as follows:

1. The plaintiff, GREAT WESTERN BANK, has failed to comply with the Housing and Community Development Act of 1987, 15 U.S.C. Sec. 1701 by failing to provide the proper notice requirements prior to institution of this foreclosure action. Therefore, they are estopped from proceeding with this foreclosure or otherwise have waived their right to foreclose this mortgage.

2. At all times material hereto, this transaction was governed under the Federal Truth in Lending Act, Title 15, U.S.C. Sec. 1601, et seq. (TILA) and subject to the Beachs' right of rescission as described by Sec. 125 of the

Act (15 U.S.C. Sec. 1635) and Reg. Z 226.23 (12 C.F.R. 226.23).

3. In the course of this consumer credit transaction, Great Western violated 15 U.S.C. Sec. 1635(a) and Reg. Z 226.23 by failing to deliver to the Beachs two (2) copies of the notice of the right to rescind which identified the transaction, clearly and conspicuously disclosed the security interest in defendants' principal dwelling, clearly and conspicuously disclosed the defendants' right to rescind the transaction, clearly and conspicuously disclosed how to exercise the rescission right with a form for that purpose, designating the address of Great Western Bank's place of business clearly and conspicuously disclosed the effects of rescission and clearly and conspicuously disclosed the date the rescission period expired.

4. Great Western Bank failed to deliver all material disclosures required by 15 U.S.C. 1601, et seq. and Reg. Z, including the following:

a. failing to properly and accurately disclose the amount financed, using that term in violation of Reg. Z 226.18(b) and 15 U.S.C. 1638(a)(2)(a);

b. failing to clearly and accurately disclose the finance charge using that term, in violation of Reg. Z 226.4 and 226.18(d), 15 U.S.C. Sec. 1638(a)(3);

c. failing to clearly and accurately disclose the annual percentage rate using that term in violation of Reg. Z 226.18(e) and 15 U.S.C. 1638(a)(4);

d. failing to properly disclose the number, amounts and timing of payments scheduled to repay the

obligation in violation of Reg. Z 226.18(g) and 15 U.S.C. 1638(a)(6);

e. failing to clearly and accurately disclose the total of payments using that term in violation of Reg. Z 226.18(h) and 15 U.S.C. 1638(a)(5).

5. The Beachs have a continuing right to rescind the transaction until the third business day after they receive both the notices described in the above paragraphs and all material disclosures described above, pursuant to 15 U.S.C. 1635(a) and Reg. Z 226.23(a)(3). The Beachs hereby notify Great Western Bank of their intention to rescind the transaction and hereby rescind the transaction.

6. As a result of the aforedescribed violations of Act and Reg. Z pursuant to 15 U.S.C. Sec. 1635(a) and 1640(a), Great Western Bank is liable to defendants for rescission of this transaction, termination of any security interest in the Beachs' property created under the transaction, return of any money or property given by the Beachs to anyone including Great Western Bank in connection with this transaction, twice the finance charge in connection with this transaction, not less than $100 nor more than $1000, the right to retain proceeds to vest in the Beachs, actual damages in an amount to be determined at trial and reasonable attorney fees under TILA.

WHEREFORE, the Beachs pray this Honorable Court take jurisdiction over this matter, dismiss Great Western's complaint with prejudice, taxing costs and fees against Great Western under the mortgage note and under TILA, rescind the transaction described above, order Great Western to take all action necessary to terminate any security interest in the Beachs' property created under

the transaction and the Court declare all such security interest void, including but not limited to the mortgage related to the transaction described above, order the return to the Beachs of any money or property given by the Beachs to anyone including Great Western Bank, enjoin Great Western during the pendency of this action and permanently thereafter from instituting, prosecuting or maintaining foreclosure proceedings on the Beachs' property, from recording any deeds or mortgages regarding the property or from otherwise taking any steps to deprive the Beachs of ownership of that property, award the Beachs twice the finance charge in connection with this transaction in an amount not less than $100 nor mote [sic] than $1000, order that the right to retain proceeds vests in the defendants, award actual damages to be established at trial and award the defendants costs and reasonable attorney fees as provided under 15 U.S.C. 1640(a) and such other relief as this Honorable Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail, to PETER M. ARMOLD, ESQ., 701 U.S. Highway One, Suite 401, N. Palm Beach, Florida 33408 this 16th day of June, 1992.

JAMES A. BONFIGLIO, P.A.
189 Bradley Place
Palm Beach, FL 33480
Mailing address: P.O. Box 1489
Boynton Beach, FL 33425
(407) 655-1225

By /s/ James A. Bonfiglio
JAMES A. BONFIGLIO
Florida Bar Member No. 288055

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION.

CASE NO.: CL 92-6071 AC

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH; LINDA M. BEACH, his wife; etc.,

Defendants.

_____/

PLAINTIFF'S REPLY TO DEFENDANTS DAVID R. BEACH & LINDA M. BEACH'S AFFIRMATIVE DEFENSES.

COMES NOW, Plaintiffs GREAT WESTERN BANK, by and through its undersigned counsel, pursuant to Rule 1.100(a), Florida Rules of Civil Procedure and replies to the affirmative defenses stated in DAVID R. BEACH and LINDA M. BEACH'S (collectively, "Beach") answer to the complaint served by mail June 26, 1992, as follows:

1. Plaintiff denies all the allegations contained in the Beach answer to the complaint.

2. For a further reply, Plaintiff affirmatively alleges the following:

a. It is the Plaintiff's business practice to, and Plaintiff did in fact, give to the Beach notice of home ownership counseling pursuant to 12 U.S.C. Section 1701.

b. Plaintiff did deliver to the Beachs a notice of the right of recession as required by 15 U.S.C. Section 1535(a) and Reg. 2226.23. A copy of the rescission notice is attached hereto and incorporated herein as Exhibit "A".

c. Plaintiff did deliver all material disclosures required by 15 U.S.C. Section 1601, et.seq. and Reg. Z. A copy of the disclosure statement is attached hereto and incorporated herein as Exhibit "B".

d. Title 15 U.S.C. Section 1601, et.seq. does not apply to the transaction because it is expressly excepted out and among other things the Beachs are bared [sic] by the time limitations provided for in 15 U.S.C. Section 1601 and Reg. Z 226.23.

WHEREFORE, Plaintiff requests judgment that the Beach's affirmative defenses be dismissed and that Plaintiff have judgment against the Defendants.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, to: **JAMES A BONFIGLIO,** P.A., attorney for Beach, 189 Bradley Place, Palm Beach, Florida 33080, P.O. Box 1489, Boynton Beach, Florida 33425 and **JOSEPH K. STILL, JR., P.A.,** attorney for Beneficial 1551 Forum

Place, Suite 500E, West Palm Beach, Florida 33401, on the 17th day of JULY, 1992.

GARY, DYTRYCH & RYAN, P.A.
Attorneys for: Plaintiff
701 U.S. Highway One, Ste.402
North Palm Beach, FL 33408
(407) 844-3700

/s/ Peter M. Armold
PETER M. ARMOLD, ESQUIRE
Florida Bar No.: 660655

EXHIBITS OMITTED

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.

_____/

MOTION TO AMEND PLAINTIFF'S REPLY TO DEFENDANTS, DAVID R. BEACH and LINDA M. BEACH'S AFFIRMATIVE DEFENSES

Plaintiff, GREAT WESTERN BANK, files this motion pursuant to Rule 1.190 of the Florida Rules of Civil Procedure to amend its reply to the Defendants', DAVID R. BEACH and LINDA M. BEACH's Affirmative Defenses, and states:

1. On July 20, 1992, a reply to Defendants' Affirmative Defenses was filed by predecessor counsel for the Plaintiff.

2. After further investigation of the claims asserted by those Defendants, Plaintiff has determined that it is necessary to clarify some of those matters set forth in the reply previously filed and to add as further replies to

those affirmative defenses, a bona fide error defense pursuant to 15 U.S.C. § 1640(c) and an exemption from the right to rescind.

3. This case has not been set for trial and Defendants will suffer no prejudice by permitting Plaintiff to so amend the pleadings.

4. The proposed Amended Reply to Affirmative Defenses is attached hereto as Exhibit "A".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent ***via telefax*** and regular mail to JAMES A. BONFIGLIO, P.A., 189 Bradley Place, Palm Beach, Florida 33480 and via regular mail to JOSEPH K. STILL, JR., P.A., 1551 Forum Place, Suite 500E, West Palm Beach, Florida 33401 this 14th day of July, 1993.

BROAD AND CASSEL
Attorneys for the Plaintiff
Reflections Centre, 5th Floor
400 Australian Avenue South
West Palm Beach, Florida 33401
Telephone: (407) 832-3300

By: /s/ Steven Ellison
STEVEN ELLISON
Florida Bar No. 510319

EXHIBIT
"A"

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.
_____/

PLAINTIFF'S AMENDED REPLY TO DEFENDANTS, DAVID R. BEACH and LINDA M. BEACH'S AFFIRMATIVE DEFENSES

Plaintiff, GREAT WESTERN BANK, pursuant to Rule 1.100(a) of the Florida Rules of Civil Procedure replies to the Affirmative Defenses stated in DAVID R. BEACH and LINDA M. BEACH's Answer and Affirmative Defenses, and states:

1. Plaintiff provided to DAVID R. BEACH and LINDA M. BEACH a Notice of Homeownership Counseling pursuant to 12 U.S.C. § 1701.

2. In accordance with 15 U.S.C. § 1635(f), Defendants' right of rescission expired three years after the date of consummation of the transaction (August 15,

1989) and by virtue of that expiration, their claim for rescission pursuant to 15 U.S.C. § 1635 is time barred.

3. Pursuant to 15 U.S.C. § 1640(c), a creditor may not be held liable in any action brought under Section 125, (15 U.S.C. § 1635) if the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

4. GREAT WESTERN had and continues to have in place, a procedure to avoid clerical errors which includes double-checking of documents by a processing supervisor or manager and complete training to employees regarding compliance with the Truth-in-Lending Act.

5. If an error was made in the disclosure to the Defendants of their right to cancel the transaction, such error was unintentional and the product of a bona fide clerical mistake for which GREAT WESTERN maintained reasonable procedures to avoid.

6. This transaction constituted a residential mortgage transaction exempted from the right of rescission under 15 U.S.C. § 1635(e)(1).

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By: /s/ Steven Ellison
STEVEN ELLISON
Florida Bar No. 510319

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.
_____/

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND PLAINTIFF'S REPLY TO DEFENDANTS, DAVID R. BEACH and LINDA M. BEACH'S AFFIRMATIVE DEFENSES

THIS CAUSE having come before the Court on Plaintiff's Motion to Amend Plaintiff's Reply to Defendants, DAVID R. BEACH and LINDA M. BEACH's Affirmative Defenses, and after hearing argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. Said motion is GRANTED.

2. Plaintiff's Reply to Defendants, DAVID R. BEACH and LINDA M. BEACH's Affirmative Defenses shall be deemed filed as of the date of this Order.

DONE AND ORDERED in Chambers in West Palm Beach, Palm Beach County, Florida, this ____ day of July, 1993.

_____
CIRCUIT COURT JUDGE

Copies Furnished:

STEVEN ELLISON, ESQ., Broad and Cassel, 400 Australian Avenue
South, Suite 500, West Palm Beach, Florida 33401
JAMES A. BONFIGLIO, P.A., 189 Bradley Place, Palm Beach, Florida 33480
JOSEPH K. STILL, JR., P.A., 1551 Forum Place, Suite 500E, West Palm Beach, Fl 33401

SIGNED & DATED

JUL 16 1993

Judge Thomas E. Sholts

IN THE CIRCUIT COURT OF THE I5TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.

_____/

PRETRIAL STIPULATION

Plaintiff, GREAT WESTERN BANK and Defendants, DAVID R. BEACH and LINDA M. BEACH, in accordance with this Court's Pretrial Order dated July 13, 1993, submit this Pretrial Stipulation and state:

I. FACTS

1. On August 15, 1986, Plaintiff loaned the Defendants the principal sum of $97,300.00 for which Defendants executed a Promissory Note and Mortgage on their principal residence.

2. The proceeds of the loan were used to satisfy a preexisting construction loan from First Federal Savings which was utilized to pay for the construction of the Defendants' primary residence.

3. On November 1, 1991, Defendants failed to make the payment due in accordance with the Promissory Note and Mortgage and have not made any other payments due since that time.

4. Defendants acknowledge that they are in default under the terms of the subject Note and Mortgage and, subject to their claims under the Truth-in-Lending Act, they agree that the Plaintiff is entitled to a judgment against them in the undisputed amount of $116,801.77 through October 7, 1993.

II. QUESTIONS OF LAW OR FACT UPON WHICH THE PARTIES HAVE STIPULATED

1. The Defendants have defaulted under the terms of the Promissory Note and Mortgage.

2. There is presently due and owing under the Promissory Note and Mortgage, the sum of $94,678.68 as principal, $15,469.58 as interest through October 7, 1993, $897.16 as late fees and $5,756.35 for property taxes and tax advance fees, making a total of $116,801.77, with a per diem of $24.511. Additionally, costs and attorney's fees are to be assessed under the terms of the Note and Mortgage subject to the Court's ruling on entitlement and reasonableness.

3. The subject loan transaction involved the Defendants' primary residence.

4. The loan with First Fidelity involved the financing of the construction of the Defendants' principal residence.

5. The Defendants received from the Plaintiff, the following Truth-in-Lending Disclosure documents:

A. Notice of Right to Cancel

B. Loan Disclosure

C. Itemization of Amount Financed

D. Good Faith Estimate of Itemization of Amount Financed

E. Federal Truth-in-Lending Disclosure Statement

F. Good Faith Estimate of Disclosure Statement

G. Consumer Handbook

H. Special ARM Notice

III. QUESTIONS OF LAW OR FACT TO BE DECIDED AT TRIAL

1. Whether the subject transaction was subject to the right of rescission as defined in 15 U.S.C. §1635(a) and whether the recitation in the loan commitment of the right of rescission obligated the Plaintiff to give that right.

2. Whether the rescission claim of the Defendants is barred by the limitation set forth in 15 U.S.C. §1635(f).

3. Whether Plaintiff provided the Defendants the wrong form of Notice of Right to Cancel at the time of the subject transaction.

4. Whether Plaintiff is entitled to the protection of 15 U.S.C. §1640(c) by virtue of a showing that any error in

providing the Defendants with the wrong form of the Notice of Right to Cancel was bona fide in nature, not intentional, and occurred notwithstanding the maintenance of procedures designed to avoid such errors.

5. Whether the annual percentage rate and finance charge are disclosed in a more conspicuous manner than any other disclosure.

6. Whether designating disclosures with an asterisk which is defined as "means estimate", violates 12 C.F.R. §226.17.

7. Whether the failure to include dollar signs in the payment schedule violates the Truth-in-Lending Act.

8. Whether the inclusion of extraneous symbols in the annual percentage rate box and the statement that the Defendants' initial contract interest rate was 8.750%, appearing on the Truth-in-Lending Disclosure Statement violates 12 C.F.R. § 226.

9. Whether Defendant is entitled to rescind the subject transaction and if so, the method for accomplishing such rescission.

10. Whether Defendant is entitled to statutory damages and if so, in what amount.

11. Whether Defendant is entitled to actual damages and if so, in what amount?

12. Whether the Defendant is entitled to attorney's fees and costs and if so, in what amount?

13. Whether the Plaintiff is entitled to attorneys fees and costs and if so, in what amount?

ATTORNEYS TO TRY CASE

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By: /s/ James A. Bonfiglio
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IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK,
formerly GREAT
WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his
wife,

Defendants.
_____/

FINAL JUDGMENT OF FORECLOSURE

THIS MATTER came before the court for trial without a jury on October 20, 1993. After the presentation of testimony, review of the documentary evidence, hearing argument of counsel and being duly advised in the premises, the court makes the following findings of fact:

1. On December 4, 1985, DAVID AND LINDA BEACH (the "BEACHES"), closed on a construction loan with Fidelity Federal Savings Bank of Florida.

2. The funds were to be used to build a home on a vacant lot they had purchased in Jupiter on June 22, 1981.

3. On August 15, 1986, the BEACHES entered into a consumer credit transaction with GREAT WESTERN

BANK ("GREAT WESTERN") in order to satisfy the construction loan from Fidelity Federal and to provide permanent financing for the acquisition of their home.

4. The BEACHES received numerous documents at closing, including a Federal Truth-in-Lending Act ("TILA") Disclosure Statement, a Closing Statement, a Three Day Notice of Right to Cancel, a VRM II T-Bill Rate Disclosure Statement, a Special VRM Notice, an Itemization of Amount Financed, a Good Faith Estimate of the Itemization of the Amount Financed, a Good Faith Estimate of the Truth-in-Lending Disclosure Statement and other disclosure documents.

5. Due to the variable rate feature of the note, GREAT WESTERN changed the interest rate on a yearly basis.

6. On December 1, 1991, the BEACHES defaulted on the loan by failing to make payment on the note.

7. Previously, the BEACHES had made $52,376.71 in payments and late charges to GREAT WESTERN.

8. The parties have stipulated that as of October 20, 1993, the BEACHES owe GREAT WESTERN $116,801.77.

9. GREAT WESTERN initiated foreclosure proceedings and the BEACHES asserted, as an affirmative defense, that GREAT WESTERN violated TILA.

10. The Notice of Right to Cancel form given to the BEACHES was the incorrect form.

11. The distribution of the wrong form to the BEACHES was the result of an unintentional bona fide error which did not constitute an error of legal judgment

with respect to Plaintiff's obligations under the Truth-in-Lending Act.

12. In accordance with the testimony of Cindy Newman, Plaintiff maintained procedures reasonably adapted to avoid the distribution of incorrect rescission forms.

13. The BEACHES did not seek to rescind the GREAT WESTERN mortgage until after the institution of this foreclosure action.

ISSUES PRESENTED

A. Whether GREAT WESTERN has violated the Truth-in-Lending Act by failing to make the proper disclosures to the BEACHES when they consummated the August 15, 1986 loan.

B. What remedies are available to the BEACHES for any violations of the Federal Truth-in-Lending Act?

LEGAL ANALYSIS

A. Whether GREAT WESTERN Violated TILA by Failing to Make the Proper Disclosures to the BEACHES When They Consummated the August 15, 1986 Loan?

(1) More Conspicuous Rule.

15 U.S.C. § 1632(a) provides as follows: "The terms annual percentage rate and finance charge shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction,

except information relating to the identity of the creditor." The BEACHES allege that GREAT WESTERN violated this subsection because it "used the same or smaller print size, style type and boldness for APR and FC as it did for "your initial contract rate is", "means estimate" and other typed in language." Although the print size, style type and boldness of the numbers themselves appear to be the same as other disclosures on the TILA statement, both the APR and FC are surrounded by a large bold box that sets these items apart from the other disclosures. The boxes are printed in bolder print than the boxes surrounding the amount financed and total of payments. In *Flesher v. Household Finance Corp.*, 640 F.2d 861, 862 (6th Cir. 1980), the Sixth Circuit held that the lender did not violate TILA by highlighting the APR and FC in such a manner:

> We agree with the District Court that HFC complied with the Act by putting the "finance charge" and the "annual percentage rate" in a box with a heavy black line. *The highlighting of the "annual percentage rate" and the "finance charge" by placing them in black boxes, constitutes a clear and conspicuous disclosure of such terms. Frank v. Reserve Consumer Discount Co.*, 398 F.Supp. 703 (W.D. Pa. 1975). (Emphasis added).

The cases cited by the BEACHES are distinguishable because the APR and FC were not printed more conspicuously than the other terms. In this case, the fact that the APR and FC were each in a box with a heavy black line and that these boxes with heavy black lines were not used with any of the other disclosures, made the APR and FC "more conspicuously" disclosed than the other terms of

the loan. Therefore, this Court finds that GREAT WESTERN did not violate the "more conspicuous" rule.

(2) Initial Contract Interest Rate Disclosure

GREAT WESTERN placed the symbol "++" next to the APR disclosure of 8.82%. Underneath the FC box, GREAT WESTERN made the following disclosure: "++ YOUR INITIAL CONTRACT RATE IS 8.750%." The BEACHES argue that, by placing the "++" in the federal box and typing in "YOUR INITIAL CONTRACT RATE IS 8.75%" immediately below that, but outside the federal box, GREAT WESTERN violated the segregation requirement found in § 226.17(a)(1) of Regulation Z which states as follows:

> The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under § 226.18.

In *In re: Cook*, 76 B.R. 661 (Bankr. C.D. Ill., 1987), the Illinois court stated that § 226.17(a) contains two requirements:

> First, the disclosures must be made clearly and conspicuously, and second, the disclosures must be grouped together, be segregated from everything else and not contain any information not directly related to the required disclosures.

Because the required disclosures have been made clearly and conspicuously, the crux of the BEACHES' argument

is that the second requirement of § 226.17(a), that "the disclosures must be grouped together, be segregated from everything else and not contain any information not directly related to the required disclosures" has not been met.

The Official Staff Commentary to § 226.17(a)(1)-4 contains the following comment on the segregation rule:

> ***Content of segregated disclosures.*** Footnotes 37 and 38 contain exceptions to the requirement that the disclosures under § 226.18 be segregated from material *that is not directly related to those disclosures.* Footnote 37 lists the items that may be added to the segregated disclosures, *even though not directly related to those disclosures.* Footnote 38 lists the items required under § 226.18 that may be deleted from the segregated disclosures and appear elsewhere. Any one or more of these additions or deletions may be combined and appear either together with or separate from the segregated disclosures . . . (Emphasis added).

Thus, according to this comment, as well as *Cook* and the plain language of § 226.17(a)(1), § 226.17(a)(1) does *not* mandate that the disclosures required by § 226.18 be segregated from all other information. Material that is directly related to the disclosures can be included with the disclosures.

The initial contract rate is clearly directly related to the annual percentage rate of the loan. The annual percentage rate is a function of the initial contract rate and the subsequent changes in the initial contract rate. Additionally, the initial contract rate was not listed in the federal box next to the annual percentage rate. If it was, it

could confuse and mislead the borrower. The initial contract rate is set apart from the APR and located under the APR federal box. The only extraneous figure in the federal box is "++" which is a reference to the initial contract rate. Furthermore, in *In re: Jones*, 79 B.R. 233, 236 (Bankr. E.D. Pa., 1987), the court held that the inclusion of an extraneous figure, "$4,105.00", did not entitle the debtor to damages or rescission under TILA:

> In order to successfully assert a TILA claim for damages, whether in the nature of recoupment or otherwise, TILA violations in the disclosure statement must be among those enumerated in 15 U.S.C. § 1640(a)(3). In order to give rise to a right to rescind, violations of the TILA must appear in the notice of the rescission right itself or must constitute a "material violation" of the TILA, as defined in 15 U.S.C. § 1602(u) . . .
>
> The third asserted violation, the inclusion of the extraneous figure in the "federal box" in purported violation of 12 C.F.R. § 226.17(a), was factually disputed by the lender, who claims that the extraneous figure, the recitation of the $4,105.00 net figure which the debtor received, appeared only in an internal copy of the disclosure statement retained by the lender and not on the significant copy, i.e., the one delivered to the Debtor. Putting aside the factual issue of whether the $4,105.00 figure appeared on the debtor's copy or not, an issue which we cannot resolve on this record, it is apparent that the appearance of this figure, at most a technical violation of 12 C.F.R. § 226.23(a), would not be within the scope of 15 U.S.C. § 1640(a)(3) or 12 C.F.R. § 226.23(a)(3).

Finally, the three cases cited by the BEACHES in support of their argument, *Mason v. General Finance Corp.*, 542 F.2d 1226 (4th Cir. 1976); *In re: Orr*, 697 F.2d 1011 (11th Cir. 1983); and *Friend v. Termplan*, 651 F.2d 1012 (5th Cir. 1981); are distinguishable from the instant case because (1) those cases are inapplicable since they were decided before TILA was amended by the Truth-in-Lending Simplification and Reform Act of 1980, and (2) the cases involved state terms which were inconsistent and incompatible with the federal disclosures mandated by TILA. In this case, "Initial Contract Rate" is not a term required by Florida law to be disclosed on the disclosure statement and it is not inconsistent with the APR so as to confuse or mislead the consumer. GREAT WESTERN might have violated TILA if it had used the term "Contract Rate" rather than "Initial Contract Rate". *Cook*, although a post-simplification case, is also distinguishable from the instant case because that case involved the failure of the lender to clearly and conspicuously disclose a security interest in a car and to segregate this information in the federal box. *Cook* did not involve a situation where information required by TILA was clearly and conspicuously disclosed in the federal box and other information not required by TILA was listed outside the federal box. Therefore, this Court finds that GREAT WESTERN did not violate TILA when it disclosed the initial contract rate on the TILA disclosure statement.

(3) Annual Percentage Rate, Finance Charge, Amount Financed, Total of Payments and Payment Schedule

Both parties agree that GREAT WESTERN misstated the APR by 0.035%, the finance charge by $201.84, the total of payments by $201.84, and the 348 payments in the payment schedule by 58 cents each. GREAT WESTERN argues that these misstatements did not violate TILA because they are all related to the misstatement of the APR and the deviation of the APR is within the tolerable limits allowed by TILA. 15 U.S.C. § 1606 explains that TILA permits a deviation in the APR of 0.125%:

> The disclosure of an annual percentage rate is accurate for the purpose of this title if the rate disclosed is within a tolerance not greater than one-eighth of 1 per centum, more or less than the actual rate or rounded to the nearest one-fourth of 1 per centum. The Board may allow a greater tolerance to simplify compliance where irregular payments are involved.

Because the APR is misstated by only .03%, and 15 U.S.C. § 1606 permits a tolerance of .125%, the APR disclosure is accurate. However, footnote 41 to Regulation Z, § 226.18(d) indicates that the finance charge disclosure is not accurate:

> *The finance charge shall be considered accurate if it is* not more than $5.00 above or below the exact finance charge in a transaction involving an amount financed of $1,000.00 or less, or *not more than $10.00 above or below the exact finance charge in a transaction involving an amount financed of more than $1,000.00.* (Emphasis added)

In this transaction, the finance charge is misstated by $201.84. In *Steele v. The Ford Motor Credit Co.*, 783 F.2d 1016 (11th Cir. 1986), Ford understated the finance charge by $24.00. The 11th Circuit held that this understatement constituted a material violation of TILA and that the consumer could rescind the loan:

> Ultimately, however, whether the understatement was $24.00 or $32.00 is of no consequence. An examination of our precedents reveals that in this circuit any understatement of the finance charge is a material non-disclosure, although the possibility of a de minimis exception has not been ruled out . . .
>
> . . . .
>
> We believe that *Bustamante, Harris* and *Davis,* may be read consistently with each other for the proposition that any understatement of the finance charge is material *because* any understatement would be of some significance to a reasonable consumer. Although this proposition assumes that the finance charge is somehow more important than other required disclosures, that assumption makes sense. The finance charge is the total cost of the loan to the borrower. Although other factors might also be relevant, cost would likely be of prime importance to most reasonable consumers shopping for loans.
>
> Since Ford's retention of unearned interest resulted in non-disclosure of the proper finance charge on the second loan, since any understatement of the finance charge is material under our precedents, we reverse the district court's grant of summary judgment for Ford and remand for

> further proceedings consistent with this opinion.

Id. at 1018-1020. The court noted that although footnote 41 did not govern the Ford loan, the court "would likely reach the same result if they (the footnote) did apply since the finance charge for the loan was understated by more than $10.00". *Id.* at 1019. Therefore, the disclosed finance charge is not accurate, and GREAT WESTERN has violated TILA. *See also, Gallegos v. Stokes,* 593 F.2d 372 (10th Cir. 1979) (accepting the findings of the trial court that the disclosure provisions of TILA were violated by overstating the finance charge by $28.96, as well as by overstating the annual percentage rate and the monthly payment).

GREAT WESTERN cites the Federal Reserve Board's Truth-in-Lending Policy Guide ("Policy Guide") for the proposition that if the finance charge is misstated because the APR is misstated, and the APR deviation is within the tolerable limits allowed by TILA, then the misdisclosure of the finance charge is not a violation of TILA. The Policy Guide defines *"Understated Finance Charge"* as follows:

> *"Understated finance charge"* means a disclosed finance charge which, when increased by a numerical tolerance that is generated by the corresponding APR tolerance is less than the finance charge calculated under the Act.

Footnote 1 to this definition provides as follows:

> Finance charge tolerance: The finance charge tolerance for each loan will be generated by the corresponding APR tolerance applicable to that loan. For example, consider a single-payment loan with a one year maturity which is subject to a one quarter of one percent APR tolerance. If the amount financed is $5,000.00 and the finance charge is $912.50, the APR will be 18.25%. The finance charge generated by the APR of 18% on that loan would be $900.00. The difference between $912.50 and $900.00 produces a numerical finance charge tolerance of $12.50. If the disclosed finance charge is not understated by more than $12.50, reimbursement would not be ordered.

The Policy Guide, promulgated pursuant to 15 U.S.C. § 1607, is used to determine if restitution is appropriate when the finance charge is understated in cases in which "the Federal Reserve Board acts on its own initiative . . . as a policeman over its member banks." *Ratner v. Chemical Bank New York Trust Company,* 309 F.Supp. 983, 986 (S.D. N.Y. 1969). It does not apply when a private party, pursuant to 15 U.S.C. § 1640, brings a civil action for damages or rescission under TILA. The Policy Guide does not state that the finance charge disclosure is "accurate" if it is within the numerical tolerance generated by the corresponding APR tolerance; it merely states that restitution is not appropriate in such cases. Therefore, because Footnote 41 of Regulation Z, § 226.18(d) is the proper measure of accuracy, this court should rule that GREAT WESTERN violated TILA when it misdisclosed the finance charge by $201.84, the total of payments by the same amount, and the payment amount for the last 348 payments listed on the payment schedule by $.58 cents.

(4) Use of Estimates

GREAT WESTERN placed an asterisk following the TILA numbers in the annual percentage rate disclosure, the finance charge disclosure, the amount financed disclosure, the total of payments disclosure, and the payment schedule disclosure of 348 payments at $755.23. The disclosure statement indicates that: "* MEANS ESTIMATE." The BEACHES assert that GREAT WESTERN misdisclosed the variable rate feature by disclosing those figures as estimates which violated TILA. Section 226.17(c)(2) of Regulation Z states:

> (c) ***Basis of disclosures and use of estimates.***
>
> (2) If any information necessary for an accurate disclosure is unknown to the creditor, it shall make the disclosure based on the best information reasonably available and shall state that the disclosure is an estimate.

With respect to variable rate transactions, paragraph 17(1)-9 of the Official Staff Commentary to § 226.17 provides as follows:

> ***9. Use of estimates in variable rate transactions.***
>
> The variable rate feature does not, by itself, make the disclosures estimates.

The BEACHES assert that GREAT WESTERN erred in labelling the numerical disclosures as estimates because a lender cannot label those numerical disclosures as estimates merely because the parties have entered into a variable rate transaction. GREAT WESTERN correctly cites *In re: Jones, supra,* for the proposition that disclosing

figures as estimates does not violate TILA when the disclosure statement contains the actual figures. However, as indicated above, both parties agree that some of the disclosed figures were inaccurate (overstated). Therefore, this case is distinguishable from *Jones.* Where actual figures are available, and the lender discloses estimated or incorrect figures, the lender violates TILA. *See, In re: Mitchell,* 75 B.R. 593 (Bankr. E.D. Pa., 1987). Therefore, because GREAT WESTERN inaccurately portrayed the payment schedule, the annual percentage rate, the finance charge, the amount financed, and the total of payments as estimates, GREAT WESTERN violated TILA.

(5) Dollar Signs

The BEACHES cite *Flesher v. Household Finance Corp., supra,* for the proposition that the failure to use dollar signs in the payment schedule violates the "clear and conspicuous" rule. However, *Flesher* is distinguishable from the instant case because the lender in *Flesher* failed to include a dollar sign before the "default and deferment charge". Because of this omission, the borrower could have interpreted the amount disclosed as percentage or some other charge. As a result, "plaintiffs did not know the charges to be paid upon their default or deferment under th[e] loan agreement." *Id.* at 862. In this case, it is clear that the "765.46" and "755.23" mean "$765.46" and "$755.23", especially in light of the fact that these numbers were in the "Amount of Payments" column. Therefore, GREAT WESTERN did not violate the "clear and conspicuous rule of TILA" by failing to place dollar signs in the payment schedule.

(6) Intangible Tax

The BEACHES contend that GREAT WESTERN misdisclosed the amount financed by improperly including the intangible tax in the amount financed and excluding the sum from the finance charge. Therefore, GREAT WESTERN violated TILA by overstating the amount financed and understating the finance charge. Regulation Z, § 226.4(a) defines "Finance Charge" as follows:

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

The intangible tax on the mortgage is clearly a "charge . . . imposed . . . as an incident to or a condition of the extension of credit." If the BEACHES paid for the property in full with cash, the tax would not be charged to the BEACHES because there would be no mortgage. Thus, it is not a "charge of a type payable in a comparable cash transaction." Furthermore, the Official Staff Commentary to § 226.4(a) states:

> 1. *Charges in comparable cash transactions.* Charges imposed uniformly in cash and credit transactions are not finance charges. In determining whether an item is a finance charge, and creditor should compare the credit transaction in question with a similar cash transaction. A creditor financing the sale of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or

> service. For example, the following items are not finance charges:
>
> *Taxes*, license fees, or registration fees, *paid by both cash and credit customers*. (Emphasis added).

This comment supports the conclusion that the mortgage intangible tax is a finance charge because the tax would not be incurred by a cash buyer.

GREAT WESTERN cites Regulation Z § 226.4(e)(1) for the proposition that certain taxes and fees paid to public officials for perfecting the security interest can be excluded from the finance charge. § 226.4(e)(1) provides as follows:

> (e) ***Certain Security Interest Charges.***
>
> If itemized and disclosed, the following charges may be excluded from the finance charge:
>
> (1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing or satisfying a security interest.

The Official Staff Commentary to that section states:

> 4(e) Certain Security Interest Charges
>
> 1. *Examples:* Examples of charges excluded from the finance charge under 226.4(e)(1) include:
>
> Charges for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents.
>
> Stamps evidencing payment of taxes on property if the stamps are required to file a security agreement on the property.

The payment of the intangible tax is not required to "determin[e] the existence of or for perfecting, releasing, or satisfying a security interest." The tax is not a "[c]harge for filing or recording" the mortgage. Furthermore, the intangible tax is not a documentary stamp tax. *See*, 53 *FLA. JUR. 2d, Taxation* § 29:5 (although the same transaction often triggers both taxes, there are distinct differences between the stamp tax and the intangible tax). Therefore, GREAT WESTERN violated TILA because the intangible tax charge of $194.16 was improperly included as part of the amount financed.

B. What Remedies are Available to the BEACHES for Any Violations of the Federal Truth-in-Lending Act?

(1) Introduction

In *Smith v. Fidelity Consumer Discount Company*, 898 F.2d 896, 898 (3rd Cir. 1989), the Second Circuit succinctly stated the purposes of the Federal Truth-in-Lending Act and the remedies available to consumers for TILA violations:

> Through TILA, Congress sought to remedy the "divergent and often fraudulent practices by which credit customers were apprised of the terms of the credit extended to them." *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 262 (3rd Cir. 1975). Indeed, the congressionally stated purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U.S.C. § 1601(a) . . .

> TILA achieves its remedial goals by a system of strict liability in favor of the consumers when mandated disclosures have not been made. 15 U.S.C. § 1640(a). A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor's intent. *Thomka v. A.A. Chevrolet, Inc.*, 619 F.2d 246, 249-50 (3rd Cir. 1980). "[O]nce the court finds a violation, no matter how technical, it has no discretion with respect to liability." *Grant v. Imperial Motors*, 539 F.2d 506, 510 (5th Cir. 1976).
>
> A single violation of TILA gives rise to full liability for statutory damages. Damages include actual damages incurred by the debtor plus a civil penalty equal to double the finance charge up to a maximum of $1,000.00. 15 U.S.C. § 1640(a)(1)(2)(A)(i). Multiple violations of TILA in the course of a single loan transaction do not yield multiple civil penalties but result in only a single penalty. 15 U.S.C. § 1640(g).
>
> In addition, when a creditor takes a security interest against property which is the principal dwelling of the debtor, the debtor has the right to rescind the transaction until the later of (1) midnight of the third day following the transaction or (2) the date on which the creditor delivers to the consumer the notice of the right of rescission and the material disclosures that TILA requires. 15 U.S.C. § 1635. Exercise of the right to rescind under § 1635 results in discharge of the consumer's liability for any finance charge or other charge and in discharge of any security interest taken in conjunction with the extension of creditor. 15 U.S.C. § 1635(b).

(2) Rescission

15 U.S.C. § 1635 governs the borrower's right to rescind a consumer credit transaction. § 1635 provides as follows:

> ***Disclosure of Obligor's Right to Rescind***
>
> Except as otherwise provided in this section, *in the case of any consumer credit transaction* (including opening or increasing the credit limit for an open-end credit plan) *in which a security interest,* including any such interest arising by operation of law, *is or will be retained or acquired in any property which is used as the principal dwelling of the other person to whom credit is extended, the obligor shall have the right to rescind the transaction* until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this subchapter, whichever is later. . . . (Emphasis Added).

However, § 1635(e)(1) states that:

> This section does not apply to:
>
> (1) a residential mortgage transaction defined in § 103(W).

Section 103(W) (15 U.S.C. § 1602(W)) defines a "residential mortgage transaction" as:

> a transaction in which a mortgage . . . or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.

The key issue is whether the instant transaction is one in which a mortgage was created to finance the acquisition or initial construction of the consumer's dwelling. Paragraph 2 of the Pretrial Stipulation submitted by both parties provides as follows:

> The proceeds of the loan were used to satisfy a preexistng construction loan from First Federal Savings which was utilized to pay for the construction of the Defendants' primary residence.

In regard to construction loans and permanent financing, paragraph 2(a) (24)-4 of the Official Staff Commentary to § 226.2(a) provides in part as follows:

> *Construction financing.* If a transaction meets the definition of a residential mortgage transaction and the creditor chooses to disclose it as several transactions under § 226.17(c)(6), each one is considered to be a residential mortgage transaction even if different creditors are involved. For example:
>
> . . . .
>
> One creditor finances the initial construction of the consumer's principal dwelling and another creditor makes a loan to satisfy the construction loan and provide permanent financing. Both transactions are residential mortgage transactions.

According to the Pretrial Stipulation in this case, First Fidelity financed the initial construction of the BEACHES' home and GREAT WESTERN made their loan to satisfy First Fidelity's construction loan and to provide permanent financing. The staff commentary provides that

both loans, the First Fidelity loan and the GREAT WESTERN loan, are residential mortgage transaction [sic]. Therefore, the BEACHES are not entitled to rescind the instant loan transaction.

In addition, 15 U.S.C. § 1635(f) limits the existence of the right of rescission to three years after the consummation of the mortgage transaction. The BEACHES' failure to raise a rescission claim on or before August 15, 1989, would be absolutely fatal to any right to rescind which they would have had if this were not a residential mortgage transaction exempt under 15 U.S.C. § 1635(e)(1). This court is unconvinced by the rationale of *Dawe v. Merchants Marine*, 683 P.2d 796 (Colo. 1984) and its progeny. Congress' omission in 15 U.S.C. § 1635(f) of the recoupment and set-off language contained in 15 U.S.C. § 1640(e) clearly establishes the parameters for this court concerning the continued vitality of any rescission right which may have existed, after the expiration of three years.

(3) Statutory Damages

15 U.S.C. § 1640(a)(20(A) provides for the recovery of statutory damages even for a minor violation of TILA:

> (a) except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under $125, or Chapter 4 or 5 of this title, with respect to any person is liable to such person in an amount equal to the sum of —. . . .

> (20(A)(i) *in the case of an individual action twice the amount of any finance charge in connection with the transaction*, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, *except that the liability under this subparagraph shall not be less than $100.00 nor greater than $1,000.00;* (Emphasis added)

15 U.S.C. § 1640(e) provides for a one year statute of limitations for actions seeking civil damage for TILA violations but permits borrowers to affirmatively claim recoupment to offset the lender's debt collection action:

> Any action under this section may be brought in any United States district court, or in any court of competent jurisdiction, within one year from the date of the occurrence of the violation. *This subsection does not bar a person from asserting a violation of this title in an action to collect a debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by state law.* (Emphasis added).

Florida law permits a form of recovery by way of recoupment even though the statute of limitations has expired when the party pleads it defensively rather than as an independent cause of action. *See, Allie v. Ionata*, 503 So.2d 1237 (Fla. 1987). thus, any statutory damages recoverable by the BEACHES are not barred by the statute of limitations.

In this case, the finance charge for the loan transaction exceeded $176,000.00. Therefore the BEACHES are

entitled to the maximum amount of damages under the statute, $1,000.00 for GREAT WESTERN's TILA violations.

(4) For Actual Damages

15 U.S.C. § 1640(a)(1) provides as follows:

> ***Civil Liability***
> (a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under § 125, or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of –
>
> > (1) any actual damage sustained by such person as a result of the failure;

15 U.S.C. § 1640(e) provides for a one year statute of limitations for actions seeking civil damages for TILA violations but permits borrowers to affirmatively claim recoupment to offset the lender's debt collection action. Florida law permits affirmative recovery by way of recoupment even though the statute of limitations has expired when the party pleads it defensively rather than as an independent cause of action. *See Allie v. Ionata, surpa* [sic]. Thus, any actual damages recoverable by the BEACHES are not barred by the statute of limitations. Therefore, the BEACHES are entitled to actual damages for GREAT WESTERN's TILA violations.

Actual damages, although recoverable, are difficult to prove especially in class actions. *Adiel v. Chase Federal Savings and Loan Association*, 630 F.Supp. 131 (S.D. Fla. 1986). In *Adiel*, the federal district court explained the proof required the recover actual damages:

> To recover actual damages, each member of the class must prove that "he or she would have gotten credit on more favorable terms but for the violation." *McCoy v. Salem Mortgage Company*, 74 F.R.D. 8, 12 (E.D. Mich. 1976). Relying on *McCoy*, the court in *Vickers v. Home Federal Savings and Loan Association*, 62 A.2d 1171, 404 N.Y. S.2d 201, 202 (Sup. Ct. 1978) explained the showing necessary for a Plaintiff to recover actual damages under the Act:
>
> > A plaintiff claiming actual damages must establish a causal connection between the inaccurate disclosure and his injury by demonstrating he relied on the inaccurate disclosure and thereby was effectively prevented from obtaining better credit terms elsewhere.
>
> This "but for" operates to effectuate the very purpose of the Truth-in-Lending Act . . .

Id. at 133.

In *Adiel* the Plaintiff sought actual damages of the dollar amount of the loan points. The Southern District of Florida refused to award the plaintiffs actual damages, holding that the plaintiffs did not show "that they could have obtained credit on more favorable terms but for the alleged violation of the Act." *Id.*

The Bankruptcy Court for the Eastern District of Pennsylvania in *In Re: Russell*, 72 B.R. 855 (Bankr. E.D. Pa. 1987) disagreed with the test for factual damages promulgated in *Adiel*:

We acknowledge that some cases have given the statutory provision (15 U.S.C. § 1640(a)(1) a narrow reading). In *Adiel v. Chase Federal Savings and Loan*, 630 F.Supp. 131 (S.D. Fla.1986); and *McCoy v. Salem Mortgage Company*, 74 F.R.D. 8 (E.D. Mich. 1976), the courts held that a consumer must prove "detrimental reliance," i.e. that he or she would have gotten credit on more favorable terms but for the violation, to be entitled to a recovery based on 15 U.S.C. § 1640(a)(1).

There are several reasons why we believe that such a narrow reading of § 1640(a)(1) is in error. First, the entire TILA statute is remedial, disclosure legislation. In analogous federal Securities Exchange Act and Anti-Trust Act disclosure violation cases, the Supreme Court has repeatedly held that actual damages arise upon the Plaintiff's proof that a material disclosure misstatement has been made, irrespective of whether this misstatement actually resulted in conduct in reliance of it. (Citations omitted).

Secondly, a 1980 amendment to the TILA clarified in 15 U.S.C. § 1640(b) as follows, suggests the result that the consumer should be awarded, as actual damages, a reduction of undisclosed finance charges . . .

Finally, there is language in several TILA class actions which suggest that it is unrealistic and unnecessary for consumers alleging actual damages per 15 U.S.C. § 1640(a)(1) to prove "detrimental reliance." . . .

In the instant factual setting, it is apparent that the Defendant failed to include either the $1,190.00 "origination fee" or the $300.00 commission paid to Suburban Financial Services in

the finance charge set forth in the Debtor's TILA statement. It is difficult to image a more blatant and fundamental violation of the TILA, or one more far removed from the technical and practically innocuous TILA violations that this court has determined entitle the consumer to only statutory damages . . .

. . . .

We therefore hold that, having totally failed to disclose $1,490.00 of what were clearly "finance charges" as such on the Debtor's TILA statement, the Defendant is liable to the Debtor for actual damages of $1,490.00 per 15 U.S.C. § 1640(a)(1), in addition to $1,000.00 statutory damages pursuant to 15 U.S.C. § 1640(a)(1)(A)(i).

Id. at 863-864.

Although these cases seem somewhat irreconcilable, the BEACHES have satisfied the *Adiel* test and shown that they could have obtained credit on more favorable times [sic] but for the alleged violation of the act. If GREAT WESTERN had not overstated the annual percentage rate, the finance charge, the total of payments, and the amount of each of the last 348 payments, they would have received credit on more favorable terms from GREAT WESTERN itself. Therefore, the BEACHES should be awarded actual damages in the amount of the overstated finance charge, $201.84, plus the amount of the intangible tax which was mischaracterized as part of the amount financed, $194.16 for a total of $396.00.

CONCLUSION

GREAT WESTERN committed a number of TILA violations in this loan transaction, including misdisclosure of the annual percentage rate, the finance charge, the total of payments and the amount of each of the last 348 payments. The BEACHES are entitled to statutory damages in the amount of $1,000.00 and actual damages in the amount of $396.00, for a total damage award of $1,396.00. Therefore, this court shall off-set the amount owed to GREAT WESTERN under the Note by $1,396.00. However, the court will not rescind this transaction because it was a residential mortgage transaction exempt from rescission and the BEACHES failed to seek rescission within the three year time period in which the right to rescind would have existed had this transaction not been exempt.

JUDGMENT

By virtue of the foregoing, it is

ORDERED AND ADJUDGED:

1. Plaintiff, GREAT WESTERN BANK, is due from the Defendants, DAVID R. BEACH and LINDA M. BEACH, $94,678.68 as principal, $19,513.90 as interest, $897.16 as late charges, $5,756.35 for property taxes, less the BEACHES' damages of $1,396.00 making a total of $119,450.09, that shall bear interest at the rate of 12% per year. Attorney's fees and costs shall be added to the total sum due upon a further hearing by this court.

2. GREAT WESTERN holds a lien for the total sum superior to any claim or estate of the Defendants to this

cause, on the following described real property located in Palm Beach County, Florida:

> LOT 31, SET-N-SUN, ACCORDING TO THE PLAT THEREOF ON FILE IN THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA, AS RECORDED IN PLAT BOOK 37, PAGES 143 AND 144.

3. The subject property shall not be sold and Plaintiff shall otherwise not execute on this judgment absent further order of this court.

4. Jurisdiction of this action is retained to enter further orders that are proper, including without limitation, an award of attorney's fees and costs to the Plaintiff, attorney's fees and costs to the Defendants, writs of possession and, if applicable, a deficiency judgment.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida, this 23 day of March, 1994.

CIRCUIT COURT JUDGE
THOMAS E. SHOLTS

Copies furnished:

STEVEN ELLISON, ESQ., Broad and Cassel, 400 Australian Avenue South, Suite 500, West Palm Beach, FL 33401

JAMES A. BONFIGLIO, ESQ., P.O. Box 1489, Boynton Beach, FL 33425

JOSEPH K. STILL, JR., P.A., 1551 Forum Place, Suite 500E, West Palm Beach, FL 33401.

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and LINDA M. BEACH, his wife,

Defendants.

MOTION FOR REHEARING

Plaintiff, GREAT WESTERN BANK (hereinafter "GREAT WESTERN"), moves this Court for rehearing, pursuant to Rule 1.530 of the Florida Rules of Civil Procedure, and states:

1. On March 23, 1994 this Court entered a Final Judgment of Foreclosure in favor of the Plaintiff, GREAT WESTERN BANK.

2. In the Final Judgment, the Court determined that GREAT WESTERN had violated the Truth-In-Lending Act in several ways.

3. One violation found by the Court concerned GREAT WESTERN's overstatement of the finance charge by $201.84.

4. The second violation, relating to GREAT WESTERN'S inclusion of the intangible tax in the amount financed, resulted in the Court's finding that GREAT WESTERN had understated the finance charge by $194.16.

5. If the Court maintains its determination that the intangible tax was improperly treated as part of the amount financed, then the Court's finding that the finance charge was overstated outside of the tolerable limits of 12 C.F.R. §226.18(d), fn. 41 is incorrect.

6. Taken together, the two violations determined by the Court result in an overstatement of the finance charge by a total of $7.68.

7. Since that sum is within the tolerance level provided by 12 C.F.R. §226.18(d), fn. 41, no actual damages should have been awarded.

8. The argument above presumes the Court maintains its finding that the intangible tax was improperly treated as part of the amount financed.

9. Similar to mortgage recording fees and documentary stamp taxes on a mortgage, the intangible tax is a charge imposed as an incident to or a condition of the extension of credit.

10. Therefore, it can only be excluded from the finance charge under the exception contained in 12 C.F.R. §226.4(e)(1).

11. Payment of the intangible tax is required to perfect a security interest as no mortgage is enforceable in any Florida court nor can any written evidence of such mortgage be recorded in any public record of the state

until the non-recurring intangible tax has been paid. Fla. Stat. §199.282(5).

12. As the Court noted, paragraph 4(e)(1) of the Official Staff Commentary to 12 C.F.R. §226.4(e) provides, as an example, that stamps evidencing payment of taxes on property, if the stamps are required to file a security agreement on the property, are excludable from the finance charge in accordance with §226.4(e)(1). That example was not meant to exclude other taxes which must be paid to perfect the security interest.

13. There is no rational basis for distinguishing between documentary stamps and the intangible tax. Both must be paid to perfect a mortgage although both are designed for revenue enhancement.

14. Although the Eleventh Circuit Court of Appeals, in *Rodash v. AIB Mortgage Company*, 1994 WL 62760 (11th Cir. (Fla.)), determined that it was improper to exclude the intangible tax from the finance charge, that Court's ruling was unduly restrictive as it limited the charges excludable under 12 C.F.R. §226.4(e)(1) to those whose purpose is to perfect security interests.

15. The time for rehearing in *Rodash* has not passed and motions will be filed on the intangible tax issue.

16. The *Rodash* Court, and this Court, do not address the fact that §226.4(e)(1) specifically excludes "taxes" paid for perfecting security interests.

17. The concept of a tax is purely revenue enhancement and would, by definition, never be a perfecting "fee".

18. Since it was essential for the bank to pay the intangible tax in order to perfect its security interest, the tax should be excludable from the finance charge.

WHEREFORE, GREAT WESTERN BANK moves this Court for rehearing, and asks that an Amended Final Judgment be entered in accordance with the argument set forth herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 4th day of April, 1994, to DANIEL L. BAKST, ESQUIRE, Post Office Drawer 3948, West Palm Beach, Fl 33402-3948, JAMES A. BONFIGLIO, P.A., 189 Bradley Place, Palm Beach, FL 33480, and JOSEPH K. STILL, JR., P.A., 1551 Forum Place, Suite 500E, West Palm Beach, FL 33401.

BROAD AND CASSEL
Attorneys for Creditor
The Reflections Office Centre
Suite 500
400 Australian Avenue South
West Palm Beach, Florida 33401
(407) 832-3300

By: /s/ Steven Ellison
Steven Ellison
Florida Bar No. 510319

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. CL 92 6071 AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff(s),

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendant(s).

_____/

ORDER DENYING MOTION FOR REHEARING

This cause was tried non jury and is before the court on Plaintiff's Motion for Rehearing (Docket Entry #61). Upon consideration, the motion is denied.

ORDERED at West Palm Beach, Florida,

APR 14 1994

/s/ Thomas E. Sholts
Thomas E. Sholts, Circuit Judge

Copy furnished:
James A. Bonfiglio, P. A., 189 Bradley Place, Palm Beach, Fl 33480
Joseph K. Still, Jr., P. A., 1551 Forum Place, Suite 500 E, West Palm Beach, Florida 33401
Daniel L. Bakst, Esquire, P. 0. Drawer 3948, West Palm Beach, Fl 33402-3948
Steven Ellison, Esquire, The Reflections Office Centre, Suite 500, 400 Australian Avenue South, West Palm Beach, Fl 33401

Plaintiffs Exhibit List

DATE	NO.	IDENTIFICATION	DATE	NO.	IN
10/28/93	1	Promissory Note dated 1986	10/20/93	1	W
|	2	Mortgage Deed " "	|	2	|
|	3	Federal Truth-in-lending Disclosure	|	3	|
|	4	Itemization of Amount Financed	|	4	|
|	5	Notice of Right to Cancel	|	5	|
|	6	Special VRM Notice Executed by Deft	|	6	|
|	7	Loan Disclosure Variable Rate II	|	7	|
|	8	Loan Commitment dated 7/28/86	|	8	|
|	9	Procedures Bulletin dated 10/1/82	|	9	|
|	10	" " 9/27/82	|	10	|
|	11	G.W. Procedures Bulletin dated 5/27/85	|	11	|
|	12	Loan Quote/ Approval for the Defts	|	12	|
|	13	laboring statement	|	13	|

|	14	Good Faith Estimate of Itemization	|	14	|
|	15	Blank Form Notice of Right to Cancel (GW)	|	15	|
|	16	" " (Illegible)	|	16	|
|	17	Certified Copy of Beneficial Illegible	|	17	|
↓	18	" " Great Western Savings	↓	18	↓

LEY, & MARSAA
COURT REPORTERS

PAMELA BEAUVAIS

1551 Forum Place
Phone (407) 686-0400 Suite 500-B
Fax (407) 686-0655 W. Palm Beach,
Fl. 33401

COMMENTS/PARTY NAMES: GREAT WESTERN BANK VS DAVID R. BEACH, ET UX.

Case No. CL92-6071-AG

Defendants Exhibit List

DATE	NO.	IDENTIFICATION	DATE	NO.	IN EV
10/20/93	1	WARRANTY DEED	10/20/93	1	W/O
|	2	FIDELITY FEDERAL MTGE LOAN LETTER	|	2	|
|	3	FIDELITY FEDERAL MTGE	|	3	|
|	4	FIDELITY FEDERAL NOTE	|	4	|
|	5	FIDELITY FEDERAL DISCLOSURE STATEMT	|	5	|
|	6	Certificate of Occupancy	|	6	|
|	7	Great Western Application	|	7	|
|	8	Great Western Counter Proposal	|	8	|
|	9	Fidelity Federal Estoppel Letter	|	9	|
↓	10	Bulletin Composite	↓	10	↓

COMMENTS/PARTY NAMES: GREAT WESTERN BANK VS DAVID R. BEACH, ET UX

Case No. CL92-6071-AG

PLAINTIFF'S EXHIBIT #1

NOTICE TO BORROWER: THIS NOTE CONTAINS PROVISIONS FOR AN ADJUSTABLE INTEREST RATE AND A BALLOON PAYMENT MAY BE DUE AT MATURITY

PROMISSORY NOTE

VRM II

LOAN NO.: 0-474423-3
DATE: AUGUST 15, 1986
WEST PALM BEACH, Florida

The undersigned (and if more than one, each of them jointly and severally) promises to pay GREAT WESTERN SAVINGS, a Federal Savings and Loan Association or order ("Association"), at Association's office at 9451 Corbin Avenue, Northridge, California 91328, or at such other address Association designates, the principal sum of $97,300.00 with interest from date of disbursement of funds on unpaid principal at the initial adjustable interest rate of 8.750% per year ("Initial Rate"), payable in monthly installments of $765.46 initially, commencing on 10 01 1986 and continuing on the 1ST day of each and every month thereafter until paid or until 09 01 2016 ("Maturity Date"), when all sums then remaining unpaid shall immediately become due and payable. Each installment shall be credited first to interest which became due during the month for which payment is being made, then to any unpaid interest which became due previously, and the remainder to principal; interest shall then cease on the portion of principal credited. Monthly interest will be

computed at 1/12th of the annual rate and any partial month's interest at 1/30th of the monthly calculation per day. To the extent that any scheduled monthly installment due is insufficient to pay the monthly interest required by the terms of this Note, the amount of such unpaid interest ("Deferred Interest") shall as of the due date of any such monthly installment, be added to and become a part of the unpaid principal and shall bear interest thereafter as provided in this Note.

In the event any sum has not been paid at the Maturity Date, interest shall be due from the Maturity Date on such unpaid sums, without extending the Maturity Date or waiving such default, at the rate applicable to the final monthly installment.

1. DEFINITIONS. As used in this Note: (a) "T-Bill Auction Rate" means the weekly average auction rate for United States Treasury Bills with a maturity of 26 weeks sold at a discount by the U.S. Treasury Department at its weekly auctions ("Auction."). If the Auctions are discontinued or changed in any material way, the Association may select a comparable alternate comparison rate to permit interest rate adjustments, (b) "Rate Differential" shall mean 2.750 percentage points (c) "Fixed Payment Interval" means each successive increment of 12 monthly installments due under the terms of this Note, provided, however, the final such increment may include fewer than 12 installments.

2. ADJUSTABLE INTEREST RATE TERMS. The adjusted interest rate shall be effective as of the due date of the 6th monthly installment of this Note and subsequent changes shall be effective as of the due date of each

6th monthly installment thereafter ("Rate Adjustment Dates") as follows: (a) An Average of each of the weekly T-Bill Auction Rates will be computed for those Auctions held in that Calendar month immediately preceding the calendar month in which the Rate Adjustment Date falls; (b) The Rate Differential shall be added to the **monthly average rate** as determined above; and the resulting sum shall be the interest rate of this Note until the next Rate Adjustment Date, except as limited by the terms of the following Paragraph. No prior notification of interest rate adjustments shall be required.

3. LIMITATIONS ON INTEREST RATE ADJUSTMENTS. Notwithstanding any other provision of this Note, the interest rate may NOT: (a) be increased or decreased more than 0.50 percentage points above or below the interest rate in immediately prior to any Rate Adjustment Date; (b) be adjusted more than 5.00 percentage points above or below the Initial Rate during the loan term.

4. INSTALLMENT ADJUSTMENT. At the end of each Fixed Payment Interval, the monthly installments due during the next Fixed Payment interval shall be adjusted to an amount which would be sufficient to pay in full the then outstanding balance of the loan evidenced by this Note including any Deferred Interest which may have been added to the principal under the provisions of this Note (without regard to any delinquent or prepaid installments), at the most recently established interest rate, in equal monthly installments over the remainder of the originally scheduled term. Provided, however, that any monthly installment increase or decrease required under the provisions of this paragraph shall not exceed

7½% of the last monthly installment due during the previous Fixed Payment Interval **except** monthly payments due during that Fixed Payment Interval which follows each fifth Fixed Payment Interval will be adjustable without the 7½% limitation.

5. DEFAULT AND ACCELERATION. Upon failure to pay any installment when due or to perform when due any obligation, covenant, or agreement in this Note, in the Mortgage Deed or other security instruments which secure this Note, or in any other document executed by the undersigned to induce Association to make the loan evidenced by this Note, or if any statement made by the undersigned in any such document is false or misleading, then all indebtedness (including principal and interest) remaining unpaid shall become immediately due, at Association's sole option.

6. OBLIGORS. Each Obligor (which term shall mean and include each of the undersigned and any endorser, surety or guarantor of this Note) hereof severally waives presentment, demand, protest, extension of time without notice and notice of dishonor, maturity, nonpayment or protest and all requirements necessary to hold each of them liable hereunder. No delay or omission on the part of the Association in exercising any right hereunder shall operate as a waiver of such right or of any other right under this Note or any other instrument now or hereafter evidencing or securing this Note or the obligation represented hereby.

7. LATE CHARGES. The undersigned promises to pay a late charge equal to 5% of the monthly principal and interest of any installment which is not received

within 15 days after its due date. The undersigned acknowledges that it would be extremely difficult or impracticable to determine Association's actual damages resulting from any late payment and this late charge is a reasonable estimate of those damages. Association agrees to accept this late charge as its sole right to damages for any late payment. Acceptance of any late charge shall not limit any of Association's other rights under this Note, Mortgage Deed or other documents executed to induce Association to make the loan evidenced by this Note.

ALL TERMS AND CONDITIONS CONTINUED
ON THE REVERSE SIDE HEREOF
ARE INCLUDED IN THIS PROMISSORY NOTE.
(*PLEASE SIGN YOUR NAME EXACTLY*
AS IT APPEARS BELOW)

/s/ David R. Beach
DAVID R. BEACH

/s/ Linda M. Beach
LINDA M. BEACH

PLAINTIFF'S EXHIBIT #2

RECORDING REQUESTED BY
THIS MORTGAGE DEED WAS
PREPARED BY ALINA ALVAREZ
FOR GREAT WESTERN SAVINGS

SPACE ABOVE
THIS LINE FOR
RECORDER'S
USE

(LOGO)
GREAT WESTERN SAVINGS
A Federal Savings and
Loan Association

P.O. BOX 1900
NORTHRIDGE, CA 91328

Mortgage Deed
(ADJUSTABLE INTEREST RATE)

LOAN AMOUNT: $97,300.00 LOAN NO. 0-474423-3

THIS MORTGAGE DEED, made this 15TH day of AUGUST, 1986, between DAVID R. BEACH, JOINED BY HIS WIFE, LINDA M. BEACH, herein called "Mortgagor", whose address is 5870 SET-N-SUN PLACE,
(Number and Street)
JUPITER, FL 33458
(City) (State) (Zip Code)

and GREAT WESTERN SAVINGS, a Federal Savings and Loan Association, a United States corporation, herein called "Mortgagee", WITNESSETH: That Mortgagor irrevocably grants, transfers, and assigns to Mortgagee, that certain real property located in PALM BEACH County, Florida, described as:

LOT 31, SET-N-SUN, ACCORDING TO THE PLAT THEREOF ON FILE IN THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA, AS IN PLAT BOOK 37, PAGES 143 AND 144.

97,300.00	Documentary Tax Pd $145.95
17.60	$194.60 Intangible Tax Pd.
145.95	Clerk, Palm Beach County,
194.60	Florida
	/s/ John B. Illegible

THE BALANCE OF THE INDEBTEDNESS, IF NOT SOONER PAID, IS DUE AND PAYABLE ON: SEPTEMBER 1, 2016

TOGETHER WITH all property rights or interest appurtenant thereto including, without limitation, all buildings, structures, improvements, appliances, equipment and appurtenances now or hereafter constructed or placed thereon, including, but not limited to, all apparatus and equipment, whether affixed to the land or building thereon or not affixed thereto, whether single units or centrally controlled, used to provide or supply air-cooling, air-conditioning, heat, gas, water, light and power, refrigeration, ventilation, laundry, clothes drying, dishwashing, garbage disposal or other services, waste vent systems, antennas, pool equipment, window coverings, drapes and drapery rods, carpeting and floor coverings, awnings, ranges and ovens, water heaters, attached cabinets, pumps, pipes, tanks, fire prevention, fire extinguishing and communications apparatus, elevators, escalators, and partitions, and all of the above items are declared to be and are deemed to be things affixed to and a part of the realty for the purposes of this Mortgage Deed.

TOGETHER WITH all interest which Mortgagor now has or may hereafter acquire in or to said property and in and to:

(a) All rents, issues, profits, royalties, tolls, earnings and incomes therefrom and installments of money

payable pursuant to any agreement for sale of said property or any part thereof, subject however to the right, power and authority given to and conferred upon Mortgagee by Paragraph 15 below, reserving to Mortgagor the right to collect when due and retain any of said sums prior to any event of default hereunder;

(b) All easements, rights of way and other appurtenances thereto;

(c) All shrubs, trees and plants;

(d) All adjacent lands included in enclosure or occupied by buildings located partly on the above described property;

(e) All crops growing or to be grown on said property;

(f) All water and water rights (whether or not appurtenant) and shares of stock pertaining to water or water rights, ownership of which affects said property;

(g) All claims, demands or causes of action of any kind, including proceeds of settlement of any such claim, demand or cause of action of any kind, which Mortgagor now has or may hereafter acquire, arising out of acquisition or ownership of the property, subject however to the right, power and authority given to and conferred upon Mortgagee by Paragraph 5 below Mortgagee shall have no duty to prosecute any such claim, demand or cause of action.

For the purposes of this instrument, including all provisions incorporated by reference herein, all of the foregoing described real property, property rights and interest shall be referred to as "the property".

THIS MORTGAGE DEED IS FOR THE PURPOSE OF SECURING THE FOLLOWING:

A. Payment of the loan amount above, with interest thereon, according to the terms of a Promissory Note or Notes (herein sometimes referred to as "the note") of even date herewith, made by Mortgagor, payable to Mortgagee or order, and any and all modifications and extensions or renewals thereof;

B. Payment of such additional sums, with interest thereon, as may be hereafter borrowed from Mortgagee by the then record owner or owners of the property which are hereby secured and all extensions, modifications and renewals of such additional borrowings;

C. Payment, performance and discharge of every obligation, covenant and agreement of Mortgagor whether contained or incorporated by reference in this Mortgage, or contained in any instrument now or hereafter executed by Mortgagor in connection with the loan evidenced by the note, including but not limited to any assignment, construction loan agreement, pledge agreement, security agreement, supplemental agreement, assignment of lessor's interest in leases, modification agreement or assumption agreement;

D. Payment of all sums of money with interest which may be paid out or advanced by, or may otherwise be due to Mortgagee under any provision of this Mortgage;

To Protect the Security of This Mortgage Deed, Mortgagor Agrees;

1. PRESERVATION OF THE PROPERTY. Mortgagor (a) shall keep the property in good condition and repair, (b) shall not remove, demolish or substantially alter any

building, structure or improvement thereon, (c) shall complete or restore promptly and in good workmanlike manner any building which may be constructed, damaged or destroyed thereon and will pay when due all claims for labor performed and material furnished therefore, (d) shall comply with the provisions of all insurance policies covering and with all laws and regulations affecting the property or requiring any alterations, repairs or improvements thereon, (e) shall not commit or suffer any waste thereon, (f) shall not commit or suffer any act upon the property in violation of any provision of any insurance policy or law or regulation, (g) shall paint, decorate, cultivate, irrigate, fertilize, fumigate and prune the property; and (h) consistent with the use thereof, do all other acts which the character or use of the property may reasonably require.

2. INSURANCE. Mortgagor shall, at Mortgagor's expense, provide and maintain in force at all times with respect to the property, fire and other types of insurance as may be required by Mortgagee. All of such insurance policies shall have a loss payable endorsement in favor of Mortgagee and shall be for a term and in form, content, amount, and with such insurance companies, as may be satisfactory to Mortgagee. Such policies shall be delivered to Mortgagee upon the making of this Mortgage upon the request of the Mortgagee. Mortgagor shall also deliver at such times evidence that the full premium for any such policy has been paid. Mortgagee at its option may retain possession of the original policy or may release it to the possession of the Mortgagor. If the Mortgagee retains possession of such policies, at least thirty (30) days before the expiration of any such insurance policy, a policy or

policies renewing, extending or replacing such expiring insurance shall be delivered by Mortgagor to Mortgagee. If any such insurance policy is not so delivered to Mortgagee or in the event any such insurance policy is canceled, whether the Mortgagee has in its possession the policies or not, and no reinstatement or replacement policy is received prior to termination of insurance Mortgagee, without notice to or demand upon Mortgagor, may (but shall not be obligated to) obtain such insurance with such company as Mortgagee may deem satisfactory, and pay the premium therefore, and the amount of any premium so paid shall be charged to and promptly paid by Mortgagor or at the option of Mortgagee, may be added to the indebtedness secured hereby.

In the event Mortgagee obtains any such insurance policy, Mortgagor, for his own benefit and for the protection of this equity interest in the property, hereby requests and authorizes Mortgagee, but without liability on the part of Mortgagee for failure so to do, to obtain such policy for such term and in such form, content and amount and with such insurance companies as may be satisfactory to Mortgagee. Should any policy thus obtained by Mortgagee there after be canceled, Mortgagor shall pay to Mortgagee any earned premiums on said policy and a reasonable charge for its services in obtaining such policy.

Mortgagee shall be responsible for the collection of any insurance monies, or for any insolvency of any insurer or insurance underwriter. Any part or all of the amount collected under any fire or other insurance policy may be applied by Mortgagee upon any indebtedness secured by this Mortgage at such time and in the manner

and amount as Mortgagee may determine, or at the option of Mortgagee, without reducing the Indebtedness secured hereby, may either be used to replace, restore or reconstruct the property to a condition satisfactory to Mortgagee or be released to Mortgagor. Any application, use or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice. Mortgagor shall pay Mortgagee inspection fees and other costs resulting from or connected with the casualty loss to which such insurance relates.

3. LIFE, ACCIDENT OR HEALTH INSURANCE. If Mortgagor shall assign or deliver a policy of life, accident or health insurance to Mortgagee as further security hereunder, then if Mortgagor fails to pay any premium thereon, Mortgagee shall be entitled, but not obligated, to pay any such premium. Any amount so paid shall be charged to and promptly paid by Mortgagor or, at the option of Mortgagee, may be added to the indebtedness secured hereby.

4. TAXES AND ENCUMBRANCES. Mortgagor shall pay (a) at least twenty (20) days before delinquency, all general and special taxes and assessments now or hereafter affecting the property, including any assessments on appurtenant water stock; (b) when due, all special assessments for public improvements without permitting any improvement bond to issue for any special assessment; (c) on demand of Mortgagee, all encumbrances, charges and liens on the property or any party thereof, which are or may be prior or superior hereto; (d) when due, all fees and charges incidental to ownership, occupancy or beneficial use of the property; and (e) if the property includes

a condominium, community apartment or part of a planned development, all payments required of the owner thereof under any declaration of covenants or conditions or restrictions pertaining to such project. Should Mortgagor fail to make any payment under this Paragraph 4, Mortgagee may, but shall not be obligated to, make such payment and any amount so paid shall be charged to and promptly paid by Mortgagor or, at the option of Mortgagee, shall be added to the indebtedness secured hereby, without regard to the validity or legality of such assessments, liens or charges.

5. CLAIMS, DEMANDS AND ACTIONS. Mortgagor shall (a) appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Mortgagee; (b) at the option of Mortgagee, assign to Mortgagee, to the extent of Mortgagee's interest, any claims, demands or courses of action of any kind, including any award, court judgment or proceeds of settlement of any such claim, demand or cause of action of any kind which Mortgagor now has or may hereafter acquire arising out of acquisition or ownership of the property. Without limiting the generality of the foregoing any such claim, demand or cause of action arising out of acquisition or ownership of the property may include (i) any such injury or damage to the property or any structure or improvement situated thereon, or (ii) any claim or cause of action in favor of Mortgagor which shall have arisen out of the transaction financed in whole or in part by the making of the loan secured hereby or (iii) any claim or cause of action in favor of Mortgagor (except for bodily injury) which arises as a result of any negligent or

improper construction, installation or repair of the property, including the surface or subsurface thereof, or of any building or structure thereon. Mortgagee may apply, use or release such monies so received by it in the same manner as in Paragraph 2 provided for the proceeds of fire or other insurance.

6. DEFENDING MORTGAGE. Notwithstanding the provisions of Paragraph 5, Mortgagee may (a) commence and prosecute or appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Mortgagee; (b) pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of Mortgagee appear to be prior or superior hereto; and (c) in exercising any such right, incur any liability and expend whatever amounts Mortgagee deems reasonably necessary, including cost of evidence of title and reasonable attorneys' fees.

7. PROTECTION OF SECURITY BY MORTGAGE. Should Mortgagor fail to make any payment or do any act provided in this Mortgage, then Mortgagee, but without obligation so to do, and without notice to or demand upon Mortgagor, and without releasing Mortgagor from any obligation hereof, may make any such payment or do any such act in such manner and to such extent as it deems necessary to protect the security hereof. Mortgagee is authorized to enter upon the property at any time for such purpose.

8. REIMBURSEMENT. Mortgagor shall pay immediately upon demand all costs, fees or expenses incurred and sums expended or advanced under the terms of this Mortgage by Mortgagee, with interest thereon at a rate

equal to the rate provided for in the note secured hereby, and the obligation of Mortgagor to pay such sums and interest as aforesaid shall be secured hereby. If Mortgagee shall make such payment or expend such sums, Mortgagor shall pay a service charge in an amount equal to ten per cent (10%) of the payment made or the sum expended.

9. LEASEHOLD ESTATES. If the security for this Mortgage is a leasehold estate, Mortgagor shall not modify or terminate the lease or leases creating the leasehold estate, and shall comply with all of the covenants and conditions required of the Lessee or his successor in interest to be performed under the lease or leases creating said leasehold estate, including but not limited to paying when due rent and other charges imposed upon such Lessee.

10. ESCROW (IMPOUND) ACCOUNT. Mortgagor shall pay to Mortgagee, if Mortgagee shall so demand, in addition to any other payment required hereunder, monthly installments for the purpose of creating and maintaining a fund to provide payment when due of any taxes, encumbrances, assessments, leasehold payments relating to the property, premiums for any policies of insurance insuring the property, the Mortgagor or the loan, more specifically referred to in Paragraphs 2, 3, 4 and 9. Mortgagor shall deliver promptly to Mortgagee all bills and notices thereof. Said installments shall be in such amounts as Mortgagee shall estimate from time to time to be necessary to provide sufficient monies in said fund to pay such taxes, encumbrances, assessments, leasehold payments and premiums when they become

due and shall be payable concurrently with the installment under the note. If the amounts paid to Mortgagee under the provisions of this paragraph are insufficient to pay such taxes, assessments, leasehold payments and premiums as they become due. Mortgagor shall pay to Mortgagee promptly upon demand the amount of the deficiency.

In the event of default of any obligation hereby secured, then any funds in the possession of Mortgagee under the provisions of this paragraph may, at the option of Mortgagee, be applied upon any indebtedness secured hereby.

11. FINANCIAL STATEMENTS. Within thirty (30) days after written demand by Mortgagee (but not more frequently than semi-annually), Mortgagor shall deliver to Mortgagee verified financial statements, prepared in accordance with acceptable accounting practices, for such annual or other period as Mortgagee may designate. Such financial statements shall include balance sheets, operating statements, and statements of sources and application of funds. In addition, Mortgagor shall deliver to Mortgagee on demand, copies of all leases, agreements, vouchers, receipts and other documents supporting any of the items shown in such statements. Mortgagor shall keep and maintain a full and accurate set of books and records showing all the matters above specified, and shall permit Mortgagee at any time to inspect and audit all Mortgagor's books of account, records, and papers relating to any of the foregoing matters. In the event any such audit is caused to be made by Mortgagee by reason of the failure of Mortgagor to comply with any of the foregoing provisions, then Mortgagor shall pay to Mortgagee upon

demand all expenses incurred by Mortgagee in connection with such audit.

None of the provisions of this Paragraph 11 shall be applicable so long as the property is residential in nature and designed for occupancy by less than five (5) families.

12. DAMAGE TO OR CONDEMNATION OF PROPERTY. Any award of damages or compensation for injury to, or in connection with any condemnation for public use of the property or any part thereof, or any proceeds of any settlement with respect to a condemnation whether or not eminent domain proceedings have been instituted, shall be and is hereby assigned by Mortgagor and shall be paid to Mortgagee, who may apply, use or release the amount thereof in the same manner as in Paragraph 2 provided for the proceeds of fire or other insurance.

13. BENEFICIARY'S CONSENT REQUIRED. Mortgagee may declare all sums secured hereby immediately due and payable within 30 days after such declaration except as expressly limited by law, if Mortgagor, without Mortgagee's prior written consent: (a) sells, conveys, contracts to sell, alienates or further encumbers all or any part of the property, or (b) leases all or any part of the property for a term, together with all exercisable options, of 5 years or more; or (c) suffers the title or any interest in the secured property to be divested, whether voluntarily or involuntarily; or (d) changes or permits to be changed the character or use of the property; or (e) is a partnership and any of the general partners' interests are transferred or assigned, whether voluntarily or involuntarily; or (f) is a corporation with fewer than 100 stockholders at the date of execution of this Mortgage and more than 10%

of its capital stock is sold, transferred or assigned during a 12-month period.

14. NO WAIVER. Mortgagee by accepting payment of any sum secured hereby after its due date, or by making payment or taking any action which, under the provisions hereof Mortgagee is entitled but not obligated to make or take, or by forbearing from enforcing any of its rights, shall not be deemed to have waived its right to require payment from or action by Mortgagor and to declare a default for Mortgagor's failure to do so.

In the event Mortgagee should expressly waive any rights under any provisions of this Mortgage, such waiver shall not be deemed a waiver of any rights Mortgagee may have subsequently to require payment from or action by Mortgagor and to declare a default for Mortgagor's failure to do so.

15. ASSIGNMENT. Mortgagor hereby assigns and transfers to Mortgagee during the continuance of this Mortgage, all rents, issues, profits, royalties, tolls, earnings and income of the property including those arising by reason of any oil, gas or mineral lease thereof, and all installments of money payable pursuant to any contract of sale or lease relating to the property or any part thereof (hereinafter referred to collectively as "income"), together with the right, power and authority to collect and retain all such income as it becomes due and payable. All income received by Mortgagee through the exercise of the foregoing assignment, less all expenses, (including reasonable attorneys' fees) incurred by Mortgagee in collecting such income shall be applied by Mortgagee on any indebtedness secured by this Mortgage at such time and

in the manner and amount as Mortgagee may determine. Without limiting the generality of the foregoing, such application may include payment of periodic installments of principal and interest, or reduction of the principal balance or reimbursement to Mortgagee as provided in Paragraph 8. The foregoing assignment is intended as an assignment to take effect only upon a default by Mortgagor in any of Mortgagor's obligations under this Mortgage, and Mortgagor accordingly reserves the right, prior to any such default, to collect and retain all such income as it becomes due and payable.

16. DEFAULT BY MORTGAGOR. Upon default by Mortgagor in payment of any indebtedness secured, or in the performance of any obligation imposed upon Mortgagor, by this Mortgage, Mortgagee may, without notice and without regard to the adequacy of the security for the indebtedness secured hereby, either personally or by attorney or agent, without bringing any action or proceeding, without entering into possession of the property, or by receiver to be appointed by a court, (a) enter into possession and hold, occupy, possess and enjoy the property; (b) make, cancel, enforce, modify or terminate leases; (c) obtain and eject tenants; (d) set or modify rents; (e) take, receive and collect all or any part of the rents, issues, profits, royalties, tolls, earnings, income and installments (hereinafter referred to collectively as "income") as it becomes due and payable. After paying such costs of maintenance and operation of the property as it in its judgment may deem proper, Mortgagee may apply the balance upon the entire indebtedness then secured hereby. The acceptance of such income shall not constitute a waiver of any other right which Mortgagee

may have under this Mortgage or under the laws of Florida. The receipt and application by Mortgagee of such income pursuant hereto, shall not cure any breach or default, nor affect any proceeding instituted by reason thereof, but such income, less all costs of operation and maintenance, when received by Mortgagee, shall be applied in reduction of the entire indebtedness from time to time secured hereby. Mortgagor shall not in any manner obstruct or interfere with any of Mortgagee's rights under this Paragraph 16. In the event Mortgagee acts under the provisions of this Paragraph 16, Mortgagor shall pay a service charge in an amount equal to five percent (5%) of all income collected by Mortgagee.

17. Upon request of Mortgagor, Mortgagee may, at its sole option, from time to time make future advances to Mortgagor; provided, however, that such advances are made within twenty (20) years from the date hereof and that the total principal secured hereby and remaining unpaid, including any such advances, shall not at any time exceed the aggregate outstanding principal sum of $0.00 plus any disbursements made by Mortgagee for the payment of taxes, levies, or insurance on the Mortgaged Property, with interest on such disbursements at the default rate provided in promissory note secured hereby. Mortgagor shall execute and deliver to Mortgagee a note evidencing each and every such future advance which Mortgagee may make, and such documents as Mortgagee may require to reflect that such note is secured hereby. Mortgagor shall pay all such future advances with interest provided therefor, and the same, and each note evidencing the same, shall be secured hereby. Nothing herein contained shall obligate Mortgagee to make any

such future advances. The word "Mortgagor" as used in this paragraph, includes any successor in ownership of the Mortgaged Property or any part thereof. The word "Mortgagee" as used in this paragraph includes any assignee of Mortgagee.

18. FEES. Mortgagor shall pay to Mortgagee the maximum amount as may from time to time be permitted by law for furnishing in connection with the obligations secured hereby, each statement pursuant to any statute at the time when in force. Additionally, Mortgagor shall pay Mortgagee's fees, charges and expenses for any other statement, information or services furnished by Mortgagee in connection with the obligations secured hereby. Said services may include, but shall not be limited to, the processing by Mortgagee, of assumptions, substitutions, modifications, extensions, renewals, subordinations, rescissions, changes of owner, the processing of, or joinder in the execution of, any map, plat survey or other instrument affecting or describing the property (including all recording costs), recordation of map, plat or record of survey, grants of easements, and full and partial releases, and the obtaining by Mortgagee of any policies of insurance pursuant to any of the provisions contained in this Mortgage.

19. WAIVER OF STATUTE OF LIMITATIONS. Mortgagor hereby waives, to the fullest extent permissible by law, the statute of limitations as a defense to any demand or obligation secured by this Mortgage.

20. GENERAL PROVISIONS

A. The term "Mortgagor" shall mean all parties executing this Mortgage as Mortgagor, their respective heirs, legatees, devisees, administrators, executors, successors in interest and assigns, provided that Mortgagee shall not be obligated to give any notice required hereunder to any Mortgagor other than as shown on the face page hereof.

B. The term "Mortgagee" shall mean the owner and holder (including a pledgee) of the note secured hereby, whether or not named as Mortgagee herein.

C. Every provision of the Mortgage imposing upon Mortgagor an obligation to perform an act, or embodying an agreement by Mortgagor to perform an act, shall be construed as obligating Mortgagor to pay all costs and expenses relating thereto.

D. In the event any provision hereof shall be declared invalid or unenforceable through a final judgment in a court having competent jurisdiction, the validity or enforceability of any of the remaining terms hereof shall not be thereby impaired.

E. In this Mortgage, wherever the context so requires, the masculine gender includes the feminine and neuter, the singular number includes the plural, and vice versa, and if more than one person is named as Mortgagor, the obligations of Mortgagor shall be the joint and several obligations of each person.

F. The term "attorneys fees" shall include all costs, expenses and attorneys fees incurred prior to the institution of any proceeding, during the pendency thereof, and at all levels of appeal.

G. Captions and paragraph headings used herein are for convenience only and are not a part of this agreement and shall not be used in construing it.

21. ADJUSTABLE MORTGAGE LOAN (VARIABLE RATE). The note secured by this Mortgage Deed contains provisions which may result in increases in the interest rate, in the monthly installments, and in the unpaid principal balance. Reference is hereby made to the Promissory Note for the specific provisions relating to such increases.

The undersigned Mortgagor(s) request(s) that a copy of any notice required hereunder be mailed to each Mortgagor named on the face page hereof, at the address set forth thereon.

NOTICE TO BORROWER: THIS DOCUMENT CONTAINS PROVISIONS FOR AN ADJUSTABLE INTEREST RATE AND CONTAINS PROVISIONS WHICH MAY REQUIRE A BALLOON PAYMENT AT MATURITY.

Signature of Mortgagor

/s/ Luisa R. Bosso
Witness

/s/ Illegible Lahnson
Witness

/s/ W. J. Bosso, Jr.
Witness

/s/ Victoria Nagel
Witness

/s/ David R. Beach
DAVID R. BEACH
Borrower

Borrower

/s/ Linda M. Beach
LINDA M. BEACH
Borrower

Borrower

STATE OF FLORIDA,
COUNTY OF PALM BEACH SS.

The foregoing instrument was acknowledged before me this 15 day of Aug., 1986, by DAVID R. BEACH JOINED BY HIS WIFE LINDA M. BEACH

/s/ Luisa R. Bosso
Notary Public, State of Florida
Notary Public
State of Florida at Large
My Commission Expires
July 11, 1990

(Notarial Seal)

Mortgage Deed

(LOGO)
GREAT
WESTERN
SAVINGS
A Federal Savings
and Loan Association

PART II MORTGAGE DEED

REFERENCING PART I ATTACHED
DATED: AUGUST 15, 1986
LOAN #: 0-474423-3
LOAN AMOUNT: $ 97,300.00

Record Verified
Palm Beach County, Fla.
John B. Dunkle

PLAINTIFF'S EXHIBIT #5

EXHIBIT "G"

(LOGO)
GREAT WESTERN SAVINGS
1675 PALM BCH. LAKES BLVD. #210,
WEST PALM BEACH, FLA 33401

(GW REFINANCE)

NOTICE OF RIGHT TO CANCEL

RE: 0-474423-3 Security property located at:
5870 SET-N-SUN PLACE
JUPITER, FLORIDA 33458

Your Right To Cancel

You are entering into a new transaction to increase the amount of credit provided to you. We acquired a (mortgage/lien/security interest) (on/in) your home under the original transaction and will retain that (mortgage/lien/security interest) in the new transaction. You have a legal right under federal law to cancel the new transaction, without cost, within three business days from whichever of the following events occurs last:

(1) the date of the new transaction, which is 8/15/86; or

(2) the date you received your new Truth in Lending disclosures _____; or

(3) the date you received this notice of your right to cancel _____.

If you cancel the new transaction, your cancellation will apply only to the increase in the amount of credit. It will not affect the amount that you presently owe or the

(mortgage/lien/security interest) we already have (on/in) your home. If you cancel, the (mortgage/lien/security interest) as it applies to the increased amount is also cancelled. Within 20 calendar days after we receive your notice of cancellation of the new transaction, we must take the steps necessary to reflect the fact that our (mortgage/lien/security interest) (on/in) your home no longer applies to the increase of credit. We must also return any money you have given to us or anyone else in connection with the new transaction.

You may keep any money we have given to you in the new transaction until we have done the things mentioned above, but you must then offer to return the money at the address below. If we do not take possession of the money within 20 calendar days of your offer, you may keep it without further obligation.

How To Cancel

If you decide to cancel the new transaction, you may do so by notifying us in writing at

1675 PALM BCH. LAKES BLVD. #210,
WEST PALM BEACH, FLA 33401

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of 8/19/86 (or midnight of the third business day following the latest of the three

events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

_____ _____

Consumer's Signature Date

ACKNOWLEDGEMENT OF RECEIPT OF
2 COPIES OF NOTICE

The undersigned hereby acknowledges receipt of 2 completed copies of the Notice above.

/s/ David R. Beach /s/ Linda M. Beach
DAVID R. BEACH LINDA M. BEACH
Consumer Signature

8-15-86
Date

VERIFICATION OF ELECTION NOT TO CANCEL

The time having elapsed for cancelling the loan transaction as stated in the above Notice of Right to Cancel, each of the undersigned hereby represents that he/she has not cancelled or rescinded the above loan transaction and requests the above named association to proceed in connection with such loan transaction in reliance on this Statement.

/s/ David R. Beach /s/ Linda M. Beach
DAVID R. BEACH LINDA M. BEACH
Consumer Signature

8-20-86
Date

DISTRIBUTION: White copies for signatures – Borrowers; Canary copies – Borrowers; Pink copy – File

PLAINTIFF'S EXHIBIT #3

(LOGO)
GREAT WESTERN SAVINGS
A FEDERAL SAVINGS AND LOAN ASSOCIATION
FEDERAL TRUTH-IN-LENDING
DISCLOSURE STATEMENT

1675 PALM BCH. LAKES BLVD. #210
WEST PALM BEACH, FLA 33401
Date AUGUST 15, 1986
Applicant[s]: ~~Application~~/Loan
No. 0-474423-3

DAVID R. BEACH
LINDA M. BEACH
5870 SET-N-SUN PLACE
JUPITER, FL 33458

Subject Property: 5870 SET-N-SUN PLACE, JUPITER, FLORIDA 33458

ANNUAL PERCENTAGE RATE

The cost of your credit as a yearly rate, subject to change if this is a variable rate transaction.

++ 8.82*%

FINANCE CHARGE

The dollar amount the credit will cost you, based upon the current annual percentage rate which may change if this is a variable rate transaction.

$ 176,519.21*

AMOUNT FINANCED

The amount of credit provided to you or on your behalf.

$ 95,486.35*

TOTAL OF PAYMENTS

The amount you will have paid after you have made all payments as scheduled, based on the current annual percentage rate which may change if this is a variable rate transaction.

$ 272,005.56*

++ YOUR INITIAL CONTRACT RATE IS 8.750%

PAYMENT SCHEDULE

Number of Payments	Amount Payments	When Payments Are Due
		Monthly Beginning:
12	765.46	10/01/86
*348	755.23	10/01/87

* MEANS ESTIMATE

This is: XX A VARIABLE RATE LOAN __ A FIXED RATE LOAN

If a Variable Rate loan:

THE ANNUAL PERCENTAGE RATE AND THE TOTAL FINANCE CHARGE AND TOTAL OF PAYMENTS MAY INCREASE ILLEGIBLE ING THE TERM OF THIS TRANSACTION AS DESCRIBED IN THE SEPARATE DISCLOSURE DOCUMENTS PROVIDED ILLEGIBLE

INSURANCE: Property insurance (and flood insurance, if applicable) are required to obtain credit.
You may obtain property insurance from anyone you want that is acceptable to Great Western Savings.

If you obtain insurance from Great Western Financial Corporation Insurance Agency
our estimate of the annual property insurance premium is N/A
our estimate of the annual flood insurance premium is N/A .

SECURITY: You are giving a security interest in the subject property described above.

LATE CHARGE: If a payment is late, you will be charged a late charge of 5% of the payment.

PREPAYMENT: If you pay off early,
___ you may have to pay a penalty XX
you will not have to pay a penalty

ASSUMPTION
POLICY: XX Someone buying your property cannot assume the remainder of the loan contract on the origin Illegible

__ Someone buying your property may, subject to conditions of the Note and Security Instrument Illegible allowed to assume the remainder of the mortgage (loan).

Illegible as your contract documents and any other previously supplied disclosure documents for any additional information about non-payment, illegible demand features, variable annual percentage rate, any required repayment in full before the scheduled date, and prepayment refunds and illegible.

* *MEANS AN ESTIMATE*

I [We] hereby acknowledge receipt of the disclosure made in this notice together with copies of the documents provided.

I [We] acknowledge that this statement is neither a contract nor an obligation to make a loan.

/s/ David R. Beach 8-15-86 /s/ Linda M. Beach 8-15-86
DAVID R. BEACH DATE LINDA M. BEACH DATE

FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

DAVID R. and LINDA M. BEACH,

Defendants/Appellants

vs.

GREAT WESTERN BANK,

Plaintiff/Appellee

_____/

4 DCA
CASE NO.
94-1049

DOCKET FILE

Seq	Docket dt	Type Desc.
Opid	Strick fl	Comment
Seq	Docket dt	Type Desc.
		Comment
001	04/19/94	NOTICE OF APPEAL FILED 04/14/94
002	04/19/94	ASSIGNED TO TEMPORARY PANEL
003	04/19/94	FILING FEE PAID Receipt number is 940818
004	04/20/94	APLT TO FILE ORDER APPEALED 15 DAYS.
005	05/05/94	NOTICE OF FILING ORDER BEING APPEALED.
006	05/20/94	MOT-EOT CORT RPTR TRANS-CR REQ 30 DAYS TO 6/28.
007	05/27/94	GR EOT COURT RPTR TRANS-CR REQ TO 6/28.
007	05/27/94	GR EOT COURT RPTR TRANS-CR REQ TO 6/28.
008	06/13/94	NOTICE OF SIMILAR CASE PENDING WITH 94-1551.

009	06/21/94	ORD-SUA SPONTE CONSOLIDATED WITH 94-1551 FOR
010	07/21/94	MISCELLANEOUS MOTION TO FILE APPENDIX.
018	08/17/94	ORD-GRANTING MISC. MOTION TO FILE APPENDIX.
011	07/21/94	MISCELLANEOUS MOTION FOR EXPANDED O.A.
046	02/28/95	ORD-DENYING MISC. MOTION FOR EXPANDED ORAL ARGUMENT.
012	07/21/94	INITIAL BRIEF ON MERITS (4)
013	08/01/94	RECEIVED RECORDS TWO (2) VOLUMES.
014	08/11/94	MOT-EOT. TO FILE ANSWER BRIEF 20 DAYS
017	08/17/94	ORD-EXTENDING ANSWER BRIEF (SERVED) WITHIN 20 DAYS.
015	08/17/94	ORD-DEFERRING TO MERITS PANEL 7/21/94 MOT. FOR EXPANDED O.A.
016	08/17/94	MULTIPLE ORD START
017	08/17/94	ORD-EXTENDING ANSWER BRIEF (SERVED) WITHIN 20 DAYS.
018	08/17/94	ORD-GRANTING MISC. MOTION TO FILE APPENDIX.
019	08/17/94	MULTIPLE ORDER END
020	08/17/94	APPENDIX TO INITIAL BRIEF.
021	09/02/94	MOT-TO DISMISS
027	12/21/94	ORD-DENYING MOT. TO DISMISS
022	09/09/94	NOTICE OF FILING EXHIBIT "A". (TO MOTION/DISMIS
023	09/19/94	RESPONSE TO MOTION TO DISMISS.

024	09/22/94	NOTICE OF SIMILAR CASE PENDING WITH 93-2566, 94-538 AND 94-66
025	09/23/94	RECEIVED EXHIBITS ONE (1) ENVELOPE.
026	10/25/94	NOTICE OF SIMILAR CASE PENDING WITH 94-2674,94-538 & 93-2566.
027 1	12/21/94	ORD-DENYING MOT. TO DISMISS
028 1	12/22/94	CASE PERFECTED
029 1	01/03/95	MISCELLANEOUS MOTION TO ENFORCE AUGUST 17, 1994 ORD
034	01/11/95	ORD-DENYING MISC. MOTION TO ENFORCE 8/17/94 ORDER.
030 1	01/03/95	RESPONSE TO MOTION TO ENFORCE 8/17 ORD.
031 1	01/03/95	MOT-EOT. TO FILE ANSWER BRIEF TO 1/6.
033	01/11/95	ANSWER BR TO BE FILED IN COURT (SERVED) BY 1/6/95. * * * FINAL * * *
032 1	01/11/95	MULTIPLE ORDER START
033 1	01/11/95	ANSWER BR TO BE FILED IN COURT (SERVED) BY 1/6/95. * * * FINAL * * *
034 1	01/11/95	ORD-DENYING MISC. MOTION TO ENFORCE 8/17/94 ORDER.
035 1	01/11/95	MULTIPLE ORDER END
036 1	01/06/95	APLEE'S ANSWER BRIEF (4)

037	01/06/95	APPENDIX
1		(4) TO ANSWER BRIEF.
038	01/06/95	MOT-FOR ATTORNEY'S FEES
1		
039	01/17/95	APLNT'S REPLY BRIEF
1		(4)
040	03/16/95	ORAL ARGUMENT DATE SET WPB
041	03/16/95	180 DAYS START DATE
042	02/02/95	MOT-TO REMAND TO REMAND GREAT WESTERN'S DIS-
047	02/28/95	ORD-DENYING REMAND
043	02/16/95	RESPONSE TO MOT/REMAND DISMISSAL, ETC.
044	02/23/95	NOTICE-SUPPLEMENTAL AUTHORITY
045	02/28/95	MULTIPLE ORDER START
046	02/28/95	ORD-DENYING MISC. MOTION FOR EXPANDED ORAL ARGUMENT.
047	02/28/95	ORD-DENYING REMAND
048	02/28/95	MULTIPLE ORDER END
049	03/09/95	NOTICE OF SIMILAR CASE PENDING 94-2958, ETC.
050	03/13/95	NOTICE-SUPPLEMENTAL AUTHORITY
051	03/14/95	NOTICE-SUPPLEMENTAL AUTHORITY
052	03/24/95	NOTICE-SUPPLEMENTAL AUTHORITY
053	04/04/95	NOTICE-SUPPLEMENTAL AUTHORITY
054	04/13/95	NOTICE-SUPPLEMENTAL AUTHORITY
055	06/20/95	NOTICE OF SIMILAR CASE PENDING CASE #'S 94-1072, ETC.

056	09/19/95	NOTICE-SUPPLEMENTAL AUTHORITY
057	09/29/95	NOTICE-SUPPLEMENTAL AUTHORITY
058	10/10/95	NOTICE OF SIMILAR CASE PENDING (FILED IN 95-1965) 94-1072, ET
059	12/05/95	NOTICE-SUPPLEMENTAL AUTHORITY
060	01/17/96	NOTICE-SUPPLEMENTAL AUTHORITY
061	01/31/96	DISP-AFFIRMED
1		OP (25)
062	02/12/96	MULTIPLE MOTION START
1		
063	02/12/96	MOT-FOR REHEARING
1		*AND/OR*
075	04/15/96	ORD-DENYING REHEARING
064	02/12/96	MOT-REHEARING EN BANC
1		
076	04/15/96	ORD-DENYING REHEARING EN BANC
065	02/12/96	MULTIPLE MOTION END
1		
066	02/20/96	NOTICE-SUPPLEMENTAL
1		AUTHORITY AS TO MOT/ REHEARING, ETC.
067	02/27/96	MOT-FOR EOT TO FILE RESPONSE
1		(15 DAYS) TO MOT/REHEARING, ET
068	03/01/96	ORD-GRANT EOT TO FILE RESPONSE 15 DAYS TO MOT-FOR REHEARING.
068	03/01/96	ORD-GRANT EOT TO FILE
1		RESPONSE 15 DAYS TO MOT-FOR REHEARING.

069	03/18/96	MOT-FOR EOT TO FILE RESPONSE
1		(SEVEN DAYS) TO MOT/ REHEARING.
070	03/21/96	ORD-GRANT EOT TO FILE RESPONSE 7 DAYS TO MOTION FOR REHEARING.
070	03/21/96	ORD-GRANT EOT TO FILE
1		RESPONSE 7 DAYS TO MOTION FOR REHEARING.
071	03/21/96	NOTICE-SUPPLEMENTAL
1		AUTHORITY (IN SUPPORT OF MOT/REHEARING)
072	03/28/96	REPLY
1		TO MOT/REHEARING, ETC. (W/ APPND
073	04/03/96	NOTICE-SUPPLEMENTAL
1		AUTHORITY (IN SUPPORT OF MOT/REHEARING)
074	04/08/96	MOT-TO STRIKE
1		AE'S REPLY TO MOT/ REHEARING, ET
077	04/15/96	ORD-DENYING STRIKE
075	04/15/96	ORD-DENYING REHEARING
1		
076	04/15/96	ORD-DENYING REHEARING EN
1		BANC
077	04/15/96	ORD-DENYING STRIKE
1		
078	04/15/96	WEST PUBLISHING
1		
079	04/24/96	MOT-TO STAY
1		PENDING SUPREME COURT REVIEW.
084	05/17/96	ORD-GRANTING STAY PENDING SUPREME COURT REVIEW.

080	04/24/96	NOTICE O/DISCRETN. JURI. TO SC
0		WITH FEE.
081	04/24/96	CASE REVIEW SENT TO S.C.
0		
082	05/14/96	ACK. RECEIPT FROM SC-PET
0		F/REV #87,835.
083	05/14/96	SUPREME COURT BRIEF
0		SCHEDULED AND RECORD DUE 6/10/96.
084	05/17/96	ORD-GRANTING STAY
0		PENDING SUPREME COURT REVIEW.
085	06/03/96	RECORD SENT TO SUPREME
0		COURT
086	04/28/97	SUPREME COURT DISPOSITION
0		SC#87,835 APPROVE
087	04/28/97	SUPREME COURT MANDATE
0		
088	04/28/97	RECORD RETURNED TO DCA
0		FROM SC
089	04/28/97	MISCELLANEOUS DOCKET ENTRY
0		SUP.CRT.ORD.DENYING REHEARING.
090	05/12/97	MANDATE
1		
091	05/12/97	CASE CLOSED
1		
092	05/13/97	MOT-TO STAY ISSUANCE
1		O/MANDATE PENDING RESOLUTION OF VARIABLE
101	07/17/97	DENY MOT. T/STAY ISSU. MANDATE
093	05/13/97	MOT-TO STAY ISSUANCE
1		O/MANDATE PENDING U.S. SUPREME COURT

101	07/17/97	DENY MOT. T/STAY ISSU. MANDATE
094 1	05/16/97	MISCELLANEOUS MOTION TO TREAT PREVIOUSLY FILE MOTIO
102	07/17/97	ORD-DENYING MISC. MOTION TO TREAT PREVIOUSLY FILED
095 1	05/22/97	NOTICE-SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOT/STAY MANDATE
096 1	05/27/97	RESPONSE TO AA'S MOTION TO RECALL AND
097	05/30/97	MISCELLANEOUS DOCKET ENTRY
1		SUPREME COURT ORDER GRANTING A
098 1	06/06/97	NOTICE OF FILING SUPREME COURT ORDER STAYING MD PER PANEL DO NOT ISSUE ANY ORDERS UNTIL STAY EXPIRES.
099 1	06/17/97	NOTICE-SUPPLEMENTAL AUTHORITY
100 1	07/03/97	SUPREME COURT MANDATE
101 1	07/17/97	DENY MOT. T/STAY ISSU. MANDATE
102 1	07/17/97	ORD-DENYING MISC. MOTION TO TREAT PREVIOUSLY FILED

David R. BEACH and Linda M. Beach, his wife, Appellants,

v.

GREAT WESTERN BANK, Appellee.

No. 94-1049.

District Court of Appeal of Florida, Fourth District.

Jan. 31, 1996.

Rehearing and Rehearing En Banc Denied April 15, 1996.

Mortgagee instituted foreclosure proceedings against mortgagors. Mortgagors asserted as affirmative defense the right to rescind under Truth in Lending Act (TILA) and damages under TILA. The Circuit Court, Palm Beach County, Thomas E. Sholts, J., rendered final judgment for mortgagee, and mortgagors appealed. The District Court of Appeal, Warner, J., held, in case of first impression in Florida, that statutory right of rescission under TILA expired three years after closing of transaction and could not be revived as defense in recoupment in foreclosure action.

Affirmed; question certified.

Pariente, J., dissented with opinion.

Appeal from the Circuit Court for Palm Beach County; Thomas E. Sholts, Judge.

James A. Bonfiglio of James A. Bonfiglio, P.A., Boynton Beach, for appellants.

Steven Ellison of Broad and Cassell, West Palm Beach, for appellee.

WARNER, Judge.

This is a case of first impression in Florida. The issue presented is whether a consumer has a right to rescind a mortgage on a home, under 15 U.S.C.A. section 1635 of the Truth in Lending Act (TILA), as a defense by way of recoupment to the lender's foreclosure action, when the defense is asserted beyond the three year period set forth in the statute. *See* TILA, 15 U.S.C.A. § 1601 et seq. (West 1982 & Supp.1995). We hold that under Florida law, a consumer is not entitled to rescind the mortgage transaction and is limited to a damage set-off as provided in TILA.[1]

Congress originally enacted TILA to create disclosure requirements to insure meaningful disclosure of credit terms by lenders so that consumers could determine the reasonableness of a lender's charge. *E.g., Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir.1975). As part of the statutory requirements, the consumer is given the right to rescind a transaction that results in the

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[1] We have reviewed the Truth in Lending Act Amendments of 1995, which the appellants have supplied as supplemental authority. Pub.L. No. 104-29, 109 Stat. 271 (September 30, 1995). Section 8 of the Truth in Lending Act amendments of 1995 addresses rescission rights in foreclosure and amends 15 U.S.C. section 1635. The amendments in part provide that "[n]oth'ng in this subsection affects a consumer's right of rescission in recoupment under State law." *Id.* § 8 (to be codified at 15 U.S.C. § 1635(i)(3)). While we do not analyze whether and to what extent these amendments have retroactive effect, we have analyzed and applied Florida law to resolve the instant case.

creditor taking a security interest in the consumer's principal dwelling. 15 U.S.C.A. § 1635(a). The consumer has an absolute right to rescind the agreement for three business days following the closing of the transaction. *Id.* Rescission may be extended for up to three years if the creditor fails to make all material disclosures to the borrower as required by TILA. 15 U.S.C.A. § 1635(f); Regulation Z, 12 C.F.R. Pt. 226.23(a) (1994) ("Reg. Z"). Exercise of the right to rescind under 15 U.S.C.A. section 1635 results in the discharge of the consumer's liability for any finance and other charges paid by the consumer and in the discharge of any security interest taken in conjunction with the extension of credit. 15 U.S.C.A. § 1635(b); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir.), *aff'd in part*, 898 F.2d 907 (3d Cir.1990). Thus, the lender would only be able to collect on the principal of the loan and would lose any security for the collection of the loan.

TILA also provides for money damages for TILA violations. 15 U.S.C.A. § 1640(a)(1)-(2)(A). While there is a one year limitation on the commencement of a cause of action for money damages, the statute specifically provides that as a defense of recoupment or set-off to an action for collection of the debt, a consumer may assert violations of TILA and the damages to which the consumer would be entitled under the statute. 15 U.S.C.A. § 1640(e).

With that brief overview of TILA, we turn now to the facts of this case. The appellants first obtained a mortgage from First Fidelity Savings and Loan for the construction of their residence. The mortgage was not strictly a construction loan mortgage as it reflected a 30-year

payout. There was no requirement for conversion to permanent financing in the loan. After completion of the construction, the appellants moved in, made two payments, and then entered into a another loan transaction with the appellee Great Western Bank ("the bank"), the proceeds of which were applied to pay off and satisfy the original mortgage loan. The bank provided appellants with Truth in Lending Act disclosure documents. At the closing, the bank furnished the appellants with the three day notice of their right to rescind. The loan transaction closed in August of 1986.

On December 1, 1991, the appellants defaulted on the loan by failing to make their installment payments. In June 1992, the bank instituted foreclosure proceedings. The appellants raised affirmative defenses to the foreclosure action, including the assertion of their right to rescind and TILA damage claims. In ruling in favor of the bank upon final judgment, the trial court found, alternatively, that based upon certain factual stipulations, the transaction was an exempt transaction not subject to rescission, and also that the failure of the appellants to assert the right to rescind within three years of the closing of the transaction was fatal to the claim. The court then determined the actual damages of $396 and statutory damages of $1,000 to which the appellants were entitled under TILA, set them off against the balance due the bank, and determined that the bank's lien was superior to all other encumbrances. The court did not immediately order foreclosure. From that order this appeal has been taken.

The parties stipulated that the loan from the bank was made to satisfy the original lender's construction

loan and to provide permanent financing. A mortgage loan secured to finance the acquisition or initial construction of a residence is exempt from the rescission requirements of TILA. 15 U.S.C.A. §§ 1635(e)(1), 1602(w). The staff commentary to Reg. Z, 12 C.F.R. Pt. 226.2(a), provides that where one creditor finances the initial construction of the residence and another creditor makes a loan to satisfy the construction loan and provide permanent financing, both transactions are residential mortgage transactions within the meaning of the exemption. Reg. Z, 12 C.F.R. Pt. 226, Supp. I, § 226.2, cmt. 2(a)(24)-4 (1994) (Official Staff Interpretations of Regulation Z). Based on the commentary together with the stipulation, the trial court found that both the First Fidelity loan and the bank's loan were residential mortgage transactions and therefore exempt from statutory rescission. On appeal, the appellants note that while the bank was paying off a construction loan, the original lender's loan not only was for construction but included permanent financing. In fact, the original loan partook of more characteristics of permanent financing than construction financing. Moreover, the appellants occupied their home for a few months before applying for the bank loan. Finally, the appellants more or less claim that the bank waived its right to assert an exemption from rescission because the bank in fact gave them that right in their disclosure documents at closing, thus acknowledging that the transaction was not exempt. We tend to agree that the stipulation is not dispositive and that the factual aspects of this transaction indicate that this is not an exempt transaction. However, further discussion of this point is unnecessary because of our other holding.

The Right of Rescission

The appellants contend that they can assert the right of rescission as a defense in recoupment for TILA violations even beyond the three year period of the statute, relying on *Dawe v. Merchants Mortgage and Trust Corp.*, 683 P.2d 796 (Colo.1984).[2] The trial court rejected the rationale of *Dawe*, determining that Congress's omission of recoupment or set-off in the section providing for rescission, 15 U.S.C.A. section 1635(f), while inserting in it the damages provision, 15 U.S.C.A. section 1640(e), established that the right of rescission was not a defense in recoupment and that the right expired after three years. We agree for the following reasons.

In 15 U.S.C.A. section 1635(f), Congress provides:

> An obligor's right of rescission **shall expire three years after the date of consummation of the transaction** or upon sale of the property, whichever occurs first. . . .

15 U.S.C.A. § 1635(f) (emphasis supplied). In *Dawe*, the Colorado Supreme Court held that a debtor's demand for section 1635(f) rescission constituted a defense in the nature of recoupment and thus, the debtor was not barred by the three year expiration period. The court relied on *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935), which held that because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded,

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[2] *Dawe* has been relied on by other courts, and we recognize that there is a split of authority in the country on this issue. We do not cite or distinguish the other cases because their reasoning is consistent with Dawe.

it is never barred by the statute of limitations so long as the main action itself is timely. 295 U.S. at 262, 55 S.Ct. at 700-701. However, the recoupment ordered by the Supreme Court was the offset of estate taxes erroneously paid on a transaction, when raised as a defense to a suit by the government for the payment of income taxes on the same transaction. The court viewed the retention of the estate taxes paid to the government through mistake as tantamount to fraud, and the government's retention of those tax payments was unjust and immoral. Recoupment was therefore equitable in nature to prevent an unjust result. In concluding recoupment could be raised as a defense, the Court cited as authority the case of *Williams v. Neely*, 134 F. 1 (8th Cir.1904). That case emphasized that "recoupment is, in its nature and essence, an equity. . . . Recoupment is the keeping back of something that is due because there is an equitable reason for holding it." *Id.* at 4-5.

The right of rescission for violations of TILA does not, in our opinion, fall within those equitable reasons required to apply recoupment. Because under section 1640 the borrower is entitled to assert damages as a defense in recoupment, the borrower is compensated for any monies which the creditor may have collected or will collect for violations of TILA. The further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years.

Dawe also suggests that it is necessary to allow rescission as recoupment beyond the three year period,

because if it were barred, lenders could avoid the penalties of TILA by waiting three years to sue on the borrowers' default and thereby frustrate the statutory policy. First, we find it unlikely that a lender would hold a loan in default for two or three years without taking action to collect it. Modern banking regulations make this highly unlikely. Regardless of the lender's actions, default on the note by the borrower is the triggering event of any suit to foreclose on the security interest. If the borrower pays on the loan as required, there is no reason for the lender to sue the borrower. Therefore, it is entirely within the control of the borrower as to whether the creditor has the ability to foreclose on its security interest in the residence. The buyer could bring a direct claim during the first three years, and after that time, merely by defaulting on the mortgage and forcing a foreclosure action, the buyer could also secure rescission by way of recoupment. Thus, by using recoupment as a method of asserting rescission, the buyer could take advantage of the remedy throughout the entire life of the secured transaction, rendering the statutory limitation meaningless. For this reason, we do not find that Dawe's argument that lenders could take advantage of the claim is persuasive. Borrowers also could take advantage of the creditor by strategically defaulting and asserting rescission as a recoupment defense.

Whether one may agree with *Dawe* or not, the ultimate question is whether as a matter of Florida law, the defensive assertion of rescission should be allowed. The appellants argue that *Allie v. Ionata*, 503 So.2d 1237 (Fla.1987), permits the assertion of their statutory right of rescission as a defense in recoupment. *Allie* recognized

the basic rule that recoupment may be asserted even though the underlying claim is barred by the applicable statute of limitations as an independent cause of action. It further held that once a party files an affirmative action, the defendant may assert any affirmative defense or compulsory counterclaim which stems from the same transaction. *Id.* at 1240. *Allie* addressed a claim barred by a statute of limitations, which bars not the right, but the remedy. *Id.*

As explained later in *Rybovich Boat Works, Inc. v. Atkins*, 585 So.2d 270 (Fla.1991), the holding of *Allie* "rested primarily on considerations of public policy and fairness as well as an analysis of the purpose of statutes of limitation." *Id.* at 271. *Allie* considered the application of limitations to claims for damages at common law. *Rybovich*, on the other hand, refused to permit the assertion of a time-barred claim for specific performance of a real estate contract as a defense to an action for damages under the contract, noting the adverse consequences on the free alienability of title through the resurrection of a barred specific performance claim. In the instant case, the bank points out that in its report to Congress on Truth In Lending in January 1972, the Board recommended that a limitation on the right to rescind be established because the title to residential real properties may become clouded by the uncertainty regarding the right of rescission. *Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth In Lending for the Year 1971.* That limitation was eventually enacted as section 1635(f).

The three year limitation contained within section 1635(f) is not a limitation on the remedy, but an expiration of the right after three years from the date of the closing of the transaction. In *Bowery v. Babbit*, 99 Fla. 1151, 128 So. 801 (Fla.1930), the court noted a general rule of construction:

> [W]here a statute confers a right and expressly fixes the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and that the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided. [citations omitted]. In other words, when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right.

Id. at 1163, 128 So. at 806 (citations omitted). Our court followed that rule in *Fowler v. Matheny*, 184 So.2d 676 (Fla. 4th DCA 1966), in construing a limitation period contained within the Uniform Sale of Securities Law:

> F.S.A. § 517.21 created an entirely new right of action that did not exist at common law and expressly attached thereto, without any exception, the proviso that the action must be brought within two years from the date of sale [of securities]. Such a limitation of time is not like any ordinary statute of limitation affecting merely the remedy, but it enters into and becomes a part of the right of action itself, and if allowed to elapse without the institution of the action, such a right of action becomes extinguished and is gone forever.

Id. at 677; *see also Special Disability Trust Fund v. Southern Bell Tel. & Tel. Co.*, 551 So.2d 575 (Fla. 1st DCA 1989).

This point was not addressed by *Dawe*, which made the assumption that section 1635(f) was a statute of limitations which barred a remedy as opposed to a special statutory action with its own limitation. However, this assumption is contrary to federal statutory construction principles. In *Simon v. United States*, 244 F.2d 703 (5th Cir.1957), the court explained the difference in terms much like *Bowery*:

> That this is hornbook law, a reference to 34 Am.Jur. 'Limitation of Actions', Sec. 7, 'Qualifications Annexed to Right of Action' will show: 'A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. *Such a provision will control, no matter in what form the action is brought.* The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the

> right of action no longer exist, and the defendant is exempt from liability. * * * ' (Emphasis supplied.)

Id. at 704-05. Thus, Florida law and federal law appear consistent as to the proper analysis of this statute.

The right of rescission of a security interest for material violations of TILA disclosures is not a right existing under the common law. It is clearly and only the creation of statute. While the legislature may be without power to abolish common law rights, the legislature may create other rights and impose on them such limitations as it deems advisable. When it does, those limitations form part of the assertion of the right itself. *Bowery*. Here, a borrower has the right to rescind a transaction for TILA violations within three years of closing or until sale of the property. Therefore, based upon *Bowery*, *Fowler*, and *Simon*, that right was extinguished with the lapse of the three year period contained within the statute's terms.

Indeed, one may glean this construction from the very language of the statute itself. "An obligor's right of rescission *shall expire three years after the date of consummation of the transaction* or upon sale of the property, whichever occurs first. . . . " 15 U.S.C.A. § 1635(f) (emphasis supplied). The remedy is not merely barred: the right dies with the lapse of time.[3]

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[3] The statute is in the nature of what we term a statute of repose rather than a statute of limitation, as the time period runs not from the borrower's discovery of TILA violations but from the closing of the transaction. As to the distinction between statutes of limitation and statutes of repose, see generally *Kush v. Lloyd*, 616 So.2d 415 (Fla.1992).

Other portions of TILA also support our construction. Section 1640 provides for damages for TILA violations. While the statute contains a one year limitation for actions for damages, it also specifically provides that despite the limitation, damages may be sought as "defense by recoupment or setoff." Certainly, when Congress intended that recoupment should be allowed, it knew how to say it. *See Russello v. United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (when Congress includes particular language in one section of a statute and omits it in another section of the same act, it is generally presumed Congress acts intentionally and purposely in disparate inclusion or exclusion). Therefore, if this were a matter of legislative intent, traditional rules of statutory construction would lead us to the conclusion that we cannot infer a Congressional intention to permit rescission beyond three years. Thus, there appears no policy reason apparent in the statute for our court to permit an expired right to be asserted as an equitable defense of recoupment.

A Florida case most closely analogous to the present case is *Devlin v. Aetna Finance Co.*, 379 So.2d 972 (Fla. 5th DCA), *cert. denied*, 389 So.2d 1108 (Fla.1980). In *Devlin*, the creditor had filed suit to recover a debt to which the borrower asserted TILA violations as a common law recoupment defense. At the time the suit was instituted, section 1640 of TILA provided that an action for damages expired one year from the closing of the transaction. There was no extension for recoupment. The county court and then the circuit court sitting in its appellate capacity both determined that the defense could not be asserted beyond the statutory limitation. On petition for writ of

certiorari review, the district court found no departure from the essential requirements of law, holding as follows:

> Whether the statutory right to recover twice the finance charges under the Federal Truth In Lending Act may be asserted beyond the one-year statutory limitation is, in our opinion, a legislative decision for Congress. The statute as written provides a one year limitation which we find clear and properly enforceable to bar the recoupment defense here asserted.
>
> Congress well knew that most debtors would become aware of creditor violations in the Truth In Lending Act only when the debtor contacts a lawyer to defend a suit on the debt brought by the creditor. The policy decision of whether the penalty of twice the finance charge is an affirmative cause of action or a defense is one best left to the Legislature rather than the courts. Congress presumably enacted the one-year limitation for some reason and they were aware of the realities of consumer credit transactions as indicated above. We are advised by counsel for petitioners than an amendment to the Truth In Lending Act is pending in Congress which would specifically answer the question posed in these cases. We are convinced that the remedy of the petitioners/debtors herein is by a change in the statute.

Id. at 973-74 (citation and footnote omitted). The court was referring to the 1980 amendment which permitted the assertion of damages as a defense in recoupment beyond the one year limitation. As noted before, Congress did not see fit to add the same savings clause to

section 1635. The reasoning of *Devlin* is consistent with our analysis.

The appellants point to the policy of the courts that TILA be liberally construed in favor of the consumer to effectuate its remedial purpose. *See Flesher v. Household Fin. Corp.*, 640 F.2d 861 (6th Cir.1981); *Riggs v. Government Employees Fin. Corp.*, 623 F.2d 68 (9th Cir.1980). However, as noted in *Riggs*, the courts which have construed the Act as remedial have been concerned with the damage remedies under section 1640. *Riggs*, 623 F.2d at 70. By allowing damages for TILA violations as a claim in recoupment, the lender is penalized for violations and the consumer is entitled to offset the indebtedness either by the borrower's actual damages or by statutory damages, whichever is greater. A liberal construction of TILA does not require the court to add remedies where Congress chose not to permit them, particularly where the alternative remedy of damages is available. To allow the consumer to assert the expired right of rescission in recoupment as a matter of public policy where Congress has not chosen to extend it does not sufficiently provide us with a public policy reason for extending recoupment. Under the law of Florida and our construction of TILA, we hold that the statutory right of rescission under TILA expires three years after the closing of the transaction and may not be revived as a defense in recoupment in an action to collect the debt upon the buyer's default.

With respect to the other points raised on appeal, we find that the trial court committed no reversible error, and therefore we affirm the final judgment.[4]

Because this is a question of great public importance, potentially affecting thousands of mortgages in the state, we also certify the following question:

> UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635 BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?

DELL, J., concurs.

PARIENTE, J., dissents with opinion.

PARIENTE, Judge, dissenting.

The majority concludes that Florida law would not permit a debtor to raise an untimely claim for rescission under TILA as a defense to a mortgage foreclosure action. I disagree and find support for the ability of the debtor to raise the claim defensively in both *Allie v. Ionata*, 503 So.2d 1237 (Fla.1987), and *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940).

The majority's rejection of the defensive use of rescission rests on its interpretation of congressional intent. To

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[4] We note that the trial court found that the bank violated TILA by including the intangible tax as part of the amount financed. We have recently held in *Pignato v. Great Western Bank*, 664 So.2d 1011 (Fla. 4th DCA 1995), that this is not a violation of TILA. However, the bank did not cross-appeal this issue. Therefore, it has not been preserved for review.

the extent that the majority's opinion turns on construing congressional intent by reading the provisions of TILA in *pari materia*, it is certainly reasonable, based on a comparison of 15 U.S.C.A. § 1635(f) with 15 U.S.C.A. § 1640(e), to reach a conclusion that Congress intended to cut off the right of rescission after three years, allowing only set-off of damages as a defense in recoupment. *See* Truth in Lending Act, 15 U.S.C.A. §§ 1601-1677 (West 1982 & Supp.1995).

However, this construction of congressional intent is less reasonable in light of the 1995 amendment, § 1635(i)(3), which provides that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." This amending language, which applies to all consumer credit transactions in existence, runs contrary to an interpretation that Congress intended to treat the right of rescission as governed by a strict statute of repose, precluding the ability of the debtor to raise it defensively. *See James v. Home Constr. Co.*, 621 F.2d 727 (5th Cir.1980); *Dawe v. Merchants Mortgage & Trust Corp.*, 683 P.2d 796, 798 n. 5 (Colo.1984). *But see Jamerson v. Miles*, 421 F.Supp. 107 (N.D.Tex.1976), *disagreed with, James*, 621 F.2d at 728; *Fenton v. Citizens Sav.*, 400 F.Supp. 874 (C.D.Mo.1975). Moreover, § 1635(f) was not part of the original statute, but rather has been described as part of a series of technical amendments designed to improve the administration of TILA.[5] In fact the original version of

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[5] In *James v. Home Construction Co.*, 621 F.2d 727 (5th Cir.1980), the fifth circuit addressed the issues of whether the newly-enacted three-year statute of limitations should apply prospectively and whether a TILA cause of action survives the

§ 1635, which created the statutory remedy of rescission, had no time limitations.

I would follow the rationale first enunciated in *Dawe* and subsequently adopted by the courts in *FDIC v. Ablin*, 177 Ill.App.3d 390, 126 Ill.Dec. 694, 532 N.E.2d 379 (1988), and *Community National Bank & Trust v. McClammy*, 138 A.D.2d 339, 525 N.Y.S.2d 629 (1988), that the debtor's right to rescind, while barring a claim for affirmative relief after the limitations period has run, is not a bar to asserting that claim as a defense. These courts, however, did not discuss whether the rescission remedy would be

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death of the party. James rejected the notion that § 1635(f) was a limitation on the existence on the substantive right to rescind rather than a true statute of limitations. The court observed:

> The fact that s. 1635 is a statutorily created right and not a common law one should make little difference in a consideration of whether or not this cause of action survives. Rather, the key inquiry in a situation like this one centers on what was the Congressional intent in passing § 1635(f). We think it clear that Congress meant to have the statute applied prospectively. First, the Truth-in-Lending Act, a remedial act, has usually been given a broad liberal interpretation since it is assumed that was the intent of Congress. *Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133 (10th Cir.1974). Second, the Conference Committee report on the Truth-in-Lending Act amendments of which s. 1635(f) were [sic] a part, described these amendments as "a series of basically technical amendments designed to improve the administration of the Truth in Lending Act." H.R.Conf.Rep. No. 93-1429, 93d Cong., 2d Sess. (1974), U.S.Code Cong. & Admin.News 1974, pp. 6119, 6152.

Id. at 729.

applied in a different manner because it was raised defensively. Yet, the *Dawe* court did observe that the debtors did not seek restitution of the installment payments; rather, they sought to avoid liability for future payments on the note. *Dawe*, 683 P.2d at 799.

Part of the difficulty in analyzing this issue has been the use of the concept of rescission by way of recoupment.[6] Although historically the plea of recoupment differed from the plea of set-off in some significant respects, the distinctions between the pleas have been largely eliminated by statute and by rules of modern pleading as explained in some detail by Justice Shaw in *Cherney v. Moody*, 413 So.2d 866 (Fla. 1st DCA 1982), adopted, *Allie*, 503 So.2d at 1239. Thus, the over-all concept, whether referred to as recoupment, set-off, compulsory counterclaim or affirmative defense, is that a party otherwise barred from instituting an action because of a time limitation was freed from that bar when acting in a defensive posture. *Allie*. The Eleventh Circuit in *Smith v. American Financial Systems*, 737 F.2d 1549, 1552 (11th Cir.1984), enunciated a three-part test for recoupment: 1) the TILA

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[6] Recoupment was a plea of common law origin arising from the same transaction which did not allow the recovery of an affirmative judgment; whereas setoff – a defense of statutory origin – could arise from a separate transaction and would permit recovery of an affirmative judgment. Modern rules of procedure have largely obliterated the historical distinctions. *See Cherney v. Moody*, 413 So.2d 866 (Fla. 1st DCA 1982), adopted, *Allie v. Ionata*, 503 So.2d 1237, 1239 (Fla.1987). For a discussion of the divergent authority between the courts in viewing TILA claims as either pleas of set-off or recoupment, see generally *Smith v. American Financial Systems*, 737 F.2d 1549, 1552-53 (11th Cir.1984).

violation and the creditor's debt arose from the same transaction; 2) the debtor is asserting the claim as a defense; and 3) the main action is timely. All three prerequisites are satisfied here.

The majority views rescission as having inflexible and draconian ramifications for the lender automatically resulting in cancellation of its security interest.[7] Certainly when viewed in this light, rescission varies significantly from the type of claims which could traditionally be pled as a defense in recoupment.

However, § 1635(b) provides that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court." *See also* 12 C.F.R. § 226.23(d)(4) ("[t]he procedures outlined . . . may be modified by court order"). Rather than creating an inflexible penalty for TILA violations, courts addressing this issue have permitted judicial modification of the statutory rescission process. *See, e.g., Williams v. Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir.1992). When viewed as a flexible remedy, a "court may impose conditions that run with the voiding of a creditor's security interest upon terms that would be equitable and just to the parties in view of all surrounding circumstances." *Id.* at 1142. In *Williams*, the bank's request had been to condition voiding of the security interest upon the debtor's return of the loan proceeds:

> In deciding whether or not to impose conditions upon Williams, the district court should

[7] In support of this conclusion, the majority cites to the language of § 1635(b) and *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir.), *aff'd in part*, 898 F.2d 907 (3d Cir.1990).

> consider traditional equitable notions, including such factors as the severity of Homestake's TILA violations and whether Williams has the ability to repay the principal amount. While the goal should always be "to restor[e] the parties to the status quo ante," [citations omitted] rescission must also maintain its vitality as an enforcement tool.

Id. If rescission can be applied as a flexible equitable remedy, there appears to be compelling public policy reasons for allowing rescission to be pled as a defense in recoupment if otherwise allowed by state law, with the precise method of enforcing the remedy left to judicial determination based on the surrounding circumstances.

If TILA does not expressly preclude a debtor from raising rescission as a defensive claim, then the question is whether Florida law otherwise would prohibit it. The majority concludes that Florida law would bar a debtor's right to raise rescission as an affirmative defense or compulsory counterclaim. I respectfully disagree.

Florida clearly adheres to the principle that the defense of recoupment may be asserted even though the underlying claim is barred by the applicable statute of limitations as an independent cause of action. See *Allie*. In its holding, *Allie* relied on *Beekner*, which recognized the right of the debtor to raise the defense of usury when a lender sued on a usury-infected contract, even though the claim of usury as an affirmative cause of action would have been barred. In *Beekner*, the lender sued to foreclose a mortgage securing notes for a loan. The debtor raised usury as a defense to defeat foreclosure. Our supreme court first pointed to the public policy considerations of

allowing the debtor to raise usury, observing that "a contrary holding would enable the lender to purge a usury infected contract by the simple process of awaiting the running of the statute of limitations before bringing the suit." *Beekner*, 145 Fla. at 156, 198 So. at 796. The court went on to explain that:

> This view, regardless of the nicety of pleading is strengthened by the general proposition that a defense should be as long-lived as a cause of action. . . . This rule in law would not be more generous in its effect than a similar one in equity.

Id. at 156-57, 198 So. at 796. The *Beekner* court approved of the use of usury as a shield to defeat recovery, but left unanswered the question of whether the time-barred claim could also be used as a sword to obtain affirmative relief. That question was answered in *Allie*.

In *Allie* our supreme court held that not only could a time-barred claim be raised as a defense, but the claim could be used as a vehicle for obtaining affirmative relief instead of merely defeating recovery. *Allie* concerned a seller who sued for the unpaid balance on the notes for two tracts of land. The buyer then interposed the seller's fiduciary breach and pled recoupment as a defense, requesting restitution and rescission of the contracts for the sale of the land. Our supreme court allowed the defensive claims of rescission and restitution, even though the statute of limitations for rescission of the contract had expired and the buyer would have been unable to institute an action for rescission.

The *Allie* court reasoned that limitation statutes were "designed as shields to protect defendants against unreasonable delays in filing law suits and to prevent unexpected enforcement of stale claims." 503 So.2d at 1240. However, these purposes are inapplicable when the same claim is raised as a defense:

> A party who seeks affirmative relief, whether through an original complaint or a counterclaim, effectively asserts that he is prepared to prosecute all aspects of that matter. Having sufficient knowledge of the facts to support a complaint and sufficient evidence to prosecute that complaint, he must be prepared to defend against any affirmative defenses arising therefrom. Thus, once a party files an affirmative action, he cannot thereafter profess to be surprised by or prejudiced by affirmative defenses or compulsory counterclaims that stem from that action.

Id. The holding in *Allie* rested primarily on considerations of public policy and fairness as well as an analysis of the purposes of statutes of limitations.

By permitting an otherwise-expired cause of action to be raised as an affirmative defense or a compulsory counterclaim, *Allie* allowed the defendant to recover an affirmative judgment. Because the defensive claims included restitution and rescission, the holding in *Allie* is particularly applicable to the analysis of what defenses Florida would allow a debtor to raise under TILA in a case arising from the same loan transaction.

Rybovich Boat Works v. Atkins, 585 So.2d 270, 272 (Fla.1991), while approving *Allie*, did not extend the

defense of recoupment to allow a time-barred action for specific performance of a contract for the purchase and sale of real property. However, our supreme court specifically acknowledged that other remedies available to an aggrieved buyer could include rescission as well as liquidated damages. *Id.* Allowing a debtor to raise a TILA defense to a suit for foreclosure on a mortgage is far closer to *Beekner* where the effect of allowing a time-barred claim of usury was to defeat the foreclosure action and to *Allie* where the court allowed the defensive claims of restitution and rescission.

I also disagree with the majority's reasoning that because the TILA cause of action runs from the date of the incident the principles underlying the defense of recoupment as explained in *Allie* and *Beekner* are rendered inapplicable. Although TILA has created a new statutory cause of action, the remedy of rescission is one derived from the common law. The statute modifies the common law right of rescission and renders it an available remedy for statutory violations of TILA. Also, the cases cited by the majority do not address the issue of whether an expired cause of action could nevertheless be raised defensively. Because the right of rescission is one derived from the common law, I do not see how it could be abrogated without a clear statutory expression of intent to do so – especially in light of the 1995 amendments which added the language stating that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." *See James*.

Because there is no question that TILA defenses can be raised and presented to the trial court in a suit for mortgage foreclosure, the controversy is over the extent

of the remedy available to rectify violations of TILA arising out of the loan transaction. In my opinion, allowing a defense of rescission in combination with vesting trial courts with the discretion to consider equitable factors before ordering rescission comes closest to effectuating the congressional intent of TILA without running afoul of Florida law.

Supreme Court of Florida Docket Sheet

Seq.	Date	Type
001	04/24/96	(NOTICE TO INVOKE DISCRET. JUR.)
002	04/30/96	(FILING FEE PAID) (Receipt No is960619)
003	04/25/96	(MOTION TO EXPEDITE)
004	05/09/96	(ORDER-SETTING BRIEF SCHEDULE & GRANTING MOTION TO EXPEDITE)
007	05/23/96	(INITIAL BRIEF ON MERITS WITH APPENDIX (ORIG & 7)
009	05/23/96	(MOTION-FOR ATTORNEYS FEES) (ORIG & 7)
010	05/23/96	(MOTION-OTHER SUBSTANTIVE) (FOR EXPANDED ORAL ARGUMENT 0&7)
011	05/24/96	(MOTION-LEV APPR AMICUS CURIAE NATIONAL CONSUMER LAW CTR)
012	05/30/96	(APPENDIX) (SUPPLEMENTAL) (ORIG & 7)
013	06/05/96	(RECORD) (TWO VOL. & ONE MANILA ENV. OF EXH)
014	06/10/96	(MOTION-EXTENSION OF TIME) (TO FILE REPLY TO PET'S INITAL BR)
015	06/11/96	(ORDER-OTHER SUBSTANTIVE) (DENIED MOT FOR EXT TO FILE RESP)

016	06/12/96	(ORDER-OTHER SUBSTANTIVE) (DENIED MOT. FOR LEAVE TO FILE)
017	06/12/96	(MOTION-FOR ATTORNEYS FEES) (ORIG & 7)
018	06/12/96	(ANSWER BRIEF ON MERITS) (0&7)-SERVED 5 DAYS LATE)
019	06/12/92	(APPENDIX) (ORIG & 7)
021	06/13/96	(RESPONSE) (OBJ) TO RS MOT/EXT OF TIME (0&7)
022	06/19/96	(REPLY BRIEF ON MERITS) (ORIG & 7)
023	06/19/96	(MOTION-TO STRIKE) (GREAT WESTERN'S BRF AS UNTIMELY)
024	06/26/96	(REPLY) (TO MOT. TO PET. MOT. TO STRIKE)
025	06/28/96	(ORDER-OTHER SUBSTANTIVE) (DENIED MOT TO STRK RESP'S BR AS)
028	07/18/96	(NO REQUEST CASE) (SENT TO WEST 7/29/96)
029	09/11/96	(NOTICE OF SUPPLMNT AUTHORITY) (ORIG & 7)
031	11/25/96	(NOTICE) (OF SIMILAR ISSUES)
032	02/13/97	(DISP-APPROVED) (WE ANSWER IN THE NEGATIVE.)
033	02/13/97	(WEST PUBLISHING) (692 SO.2D 146)

034 02/27/97 (MOTION-FOR REHEARING)
(RC)

035 03/06/97 (RESPONSE)
(ORIG & 7)

036 04/25/97 (REHEARING DISPOSED)
(DENIED (RC); PT FEES DENIED; RS)

037 04/25/97 (MANDATE)
(CC: COUNS (C:FILE) – VACATED)

038 04/25/97 (RETURNED RECORD)
(2 VOLS/1 ENVELOPE EXHIBITS)

039 05/09/97 (MOTION-FOR STAY-APPLY RVW
USSC) ( )

040 05/27/97 (RESPONSE) (TO PET'S MOT TO
STAY MANDATE)

041 05/28/97 (ORDER-OTHER SUBSTANTIVE)
(VACATED 4/25/97 MANDATE &
GRANT)

042 07/02/97 (MANDATE)
(CC: COUNS (c:FILE))

043 07/07/97 (MOTION-OTHER SUBSTANTIVE)
(FOR REISSUANCE OF MANDATE-
MOOT)

David R. BEACH, et ux., Petitioners,

v.

GREAT WESTERN BANK,
etc., Respondent.

No. 87835.

Supreme Court of Florida.

Feb. 13, 1997.

Rehearing Denied April 25, 1997.

Mortgagee brought foreclosure action against mortgagors. Mortgagors asserted, as affirmative recoupment defense, right to rescind under Truth-in-Lending Act (TILA) and damages under TILA. The Circuit Court, Palm Beach County, Thomas E. Sholts, J., entered judgment for mortgagee, and mortgagors appealed. The District Court of Appeal, Warner, J., 670 So.2d 986, affirmed and certified question to Supreme Court. The Supreme Court held that under Florida law, action for statutory right of rescission under TILA may not be revived as defense in recoupment beyond three-year expiration period.

Question answered.

James A. Bonfiglio, Boynton Beach, for Petitioners.

Steven Ellison of Broad and Cassel, West Palm Beach, for Respondent.

PER CURIAM.

We have for review *Beach v. Great Western Bank*, 670 So.2d 986 (Fla. 4th DCA 1996). We accepted jurisdiction to

answer the following question certified to be of great public importance:[1]

> UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635, BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE-YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?

670 So.2d at 994.

For the reasons expressed below, we answer the certified question in the negative and approve the Fourth District's decision. We find the majority's opinion persuasive and well-reasoned. The dissent is equally cogent; however, we believe the cases relied upon therein simply use the inappropriate analysis for statutory rescission by equating the expiration period with a statute of limitations. Nevertheless, we commend both the majority and the dissent for their thoughtful and comprehensive examination of the issue before us.

MATERIAL FACTS

Petitioners David and Linda Beach (the Beaches) obtained a bank mortgage to finance their home construction in 1985. The loan was a hybrid construction/home loan mortgage as it reflected a thirty-year payout. *Beach v. Great Western Bank*, 670 So.2d 986, 989 (Fla. 4th DCA 1996). Upon completion of construction, the Beaches

[1] We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

moved in, made two payments, and then secured another loan from Respondent Great Western Bank (Great Western) in August 1986. The Beaches used those loan proceeds to pay off and satisfy the initial loan. *Id.* at 989. Great Western provided the Beaches with Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667 (1994), disclosure documents and, at the closing, notified them of their absolute right to rescind the agreement within three business days following the transaction.[2]

Five years later on December 1, 1991, the Beaches defaulted on their mortgage after failing to make their installment payments. 670 So.2d at 989. Subsequently, Great Western instituted a foreclosure action in June 1992. In response, the Beaches raised several affirmative defenses, including their right to rescind and TILA damage claims. The basis of the Beaches' rescission claim was several overstatements made by Great Western on the disclosure documents. The trial court found that Great Western overstated the Beaches' monthly mortgage payment by fifty-eight cents ($.58), resulting in a $201.84 overcharge. The court also found that Great Western overstated the finance charge by $7.24 ($176,519.21 rather than $176,511.97). The trial court ruled for Great Western on the rescission issue, finding that the loan was an

[2] TILA also allows rescission up to three years after the transaction if the creditor fails to make all material disclosures to the borrower. This three-year extension, section 1635(f), based upon the lender's bad faith in not disclosing material terms, is the key provision at issue in this case. Material disclosures include the loan's annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule.

exempt transaction not subject to rescission,[3] and that the Beaches' failure to assert their rescission right within three years of closing precluded their claim. 670 So.2d at 989. However, the trial court awarded the Beaches $396 in actual damages and $1000 in statutory damages as provided by TILA[4] to remedy the overstatements, set them off against the balance due Great Western, and found Great Western's lien superior to all other encumbrances. 670 So.2d at 989.

On appeal to the Fourth District, the Beaches contended that they could assert their rescission right as a defense in recoupment for TILA violations even beyond the three-year period fixed by the statute. *Id.* at 990. The district court disagreed, concluding that recoupment is primarily an equitable remedy designed to prevent unjust enrichment. *Id.* Recognizing that the statute already provides borrowers a right to assert damages as a defense in recoupment, the court deemed the further remedy of rescission as a penalty provision to creditors and further noted that the rescission right was purely a creation of the statute itself and the statute specifically fixed a time limitation on the right. *Id.* at 990-93. Consequently, the district court affirmed the trial court's final judgment,

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[3] "Residential mortgage transactions" are exempt from TILA's rescission requirements. Section 1602(w) defines these loans as "created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling."

[4] Section 1640 provides for actual and statutory damages and includes a one-year statute of limitations in subsection (e). However, section 1640(e) also contains a savings clause which specifically allows "defense by recoupment or set-off" beyond the one-year statute of limitation.

holding that under Florida law the statutory right of rescission in TILA expires three years after the transaction's closing date and may not be revived as a defense in recoupment in a creditor's foreclosure action. *Id.* at 993. Finally, recognizing the potential significance of its decision to thousands of other Florida borrowers, the district court certified the above question for our review. *Id.* at 994.

LAW AND ANALYSIS

As the district court acknowledges, there is a "split of authority in the country on this issue," *Beach*, 670 So.2d at 990 n. 2, of whether the right of rescission may be asserted as a defense in recoupment for TILA violations beyond the statute's three-year expiration period. We begin our analysis with an overview of TILA and the relevant caselaw.

In 1968, Congress enacted TILA with the broad purpose of ensuring "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *See* 15 U.S.C. § 1601(a) (1994). As part of the Act, Congress provided the consumer with the absolute right to rescind the secured transaction within three business days following closing for any reason, and up to three years from the same closing date if the creditor failed to make all material disclosures. Section 1635(f) of 15 U.S.C. (1994), expressly provides: "An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon sale of the property, whichever occurs first. . . . " When a

borrower exercises his or her right to rescind in either of the above circumstances, he or she is not liable for any finance or other charges, and any security interest given by the borrower becomes void upon rescission.[5] The end result is that the lender can only collect on the loan principal and loses any security for the loan's collection. *Beach*, 670 So.2d at 989.

TILA also provides for actual and statutory damages in section 1640(a). Furthermore, while section 1640(e) includes a one-year statute of limitations, it also specifically "does not bar a person from asserting a violation . . . in an action to collect the debt . . . as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law." This savings clause is only found in this section relating to damages; no corresponding clause accompanies the expiration of the statutory right of rescission in section 1635.

Congress also recognized that the complexity and variety of credit transactions precluded comprehensive regulation by a single statute. Accordingly, it delegated extensive authority to the Federal Reserve Board to implement regulations governing commerce in credit. 15 U.S.C. § 1604(a). In this case, the result was Part 226 of Title 12 of the Code of Federal Regulations, better known

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[5] This is in contrast to common law rescission whereby the rescinding party must first tender the property received under the agreement before the contract is considered void. *See* Joel P. Bishop, *Commentaries on the Law of Contracts* § 833 (Enlarged ed. 1887); *see also Kamerman v. Curtis*, 285 N.Y. 221, 33 N.E.2d 530 (1941); *E.T.C. Corp. v. Title Guarantee & Trust Co.*, 271 N.Y. 124, 2 N.E.2d 284 (1936).

as Regulation Z. *Selected Commercial Statutes* 1543 (West Publishing Co., 1995 ed.).

The United States Supreme Court has stated that "deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980). Administrative expertise in this highly technical area should be recognized "[u]nless demonstrably irrational." *Milhollin*, 444 U.S. at 565, 100 S.Ct. at 797. While an agency's interpretation of its own regulations has traditionally been accorded considerable respect, *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945), deference is all the more appropriate in this case as "Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law." *Milhollin*, 444 U.S. at 566, 100 S.Ct. at 797. Thus, any analysis of a TILA issue should include Regulation Z and the Official Commentary thereto, *see Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219, 101 S.Ct. 2266, 2273-74, 68 L.Ed.2d 783 (1981), in addition to the statute's plain language.

Regulation Z treats the right of rescission as follows:

> The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in

> the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

12 C.F.R. § 226.23(a)(3) (1996) (footnote omitted).

Similarly, the Official Staff Commentary concisely states that "the right to rescind automatically lapses on the occurrence of the earliest of the following three events: [t]he expiration of 3 years after consummation of the transaction. . . . " 12 C.F.R. § 226.23, para. 23(a)(3)3. (Supp. I 1996). Likewise, as previously noted, the statute itself provides:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon sale of the property, whichever occurs first
>
> . . . .

15 U.S.C. § 1635(f) (1994). In conjunction, these three authorities reflect Congress's intent regarding rights of rescission under TILA. Their clarity and plain meaning support the majority opinion below.[6] However, that does not end our inquiry.

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[6] Of note, Congress enacted TILA amendments in 1995. Although the new provision does not relate to this case's factual situation, the committee report ("Committee Report Regarding Truth-in-Lending Act Amendments of 1995, Section 113, Rescission Rights in Foreclosure") reiterates the plain meaning of the statute. Specifically, "[t]he consumer protection provisions in this section are intended to benefit consumers that are unable to meet their mortgage obligations and are not intended as a mechanism whereby consumers can avoid their obligations by defaulting and then raising the defense in foreclosure." Furthermore, "[r]escission rights expire in three years. The time period shall not be extended except as explicitly provided in section 125(f) relating to agency enforcement proceedings." That exception does not apply to this case.

In Florida, "[i]t is well established that the defense of recoupment may be asserted defensively where the underlying claim is barred by the statute of limitations." *Willoughby v. Dowda & Fields, Chartered*, 643 So.2d 1098, 1099 (Fla. 5th DCA 1994) (on rehearing); *see also Allie v. Ionata*, 503 So.2d 1237 (Fla.1987); *Payne v. Nicholson*, 100 Fla. 1459, 131 So. 324 (1930). Similarly, this principle informed the court in *Dawe v. Merchants Mortgage & Trust Corp.*, 683 P.2d 796 (Colo.1984),[7] a case the Beaches and the dissent below rely upon.

In *Dawe*, the Colorado Supreme Court held that the borrower's demand for rescission was a defense in the nature of recoupment and was not barred by section 1635(f)'s three-year expiration period. However, as noted by the district court, the *Dawe* court simply assumed that section 1635(f) was a statute of limitations which precluded a remedy, rather than a statute which created the right and the remedy, and included its own expiration period. *Beach*, 670 So.2d at 992.

Moreover, the borrowers in *Dawe* defaulted less than a year after consummating their loan, well within TILA's three-year rescission window. However, the creditor did

---

[7] Relying on *Dawe*, similar reasoning was used in *Federal Deposit Insurance Corp. v. Ablin*, 177 Ill.App.3d 390, 126 Ill.Dec. 694, 532 N.E.2d 379 (1988); *Community National Bank & Trust Co. v. McClammy*, 138 A.D.2d 339, 525 N.Y.S.2d 629 (N.Y.App.Div.1988); *In re Shaw*, 178 B.R. 380 (Bankr.D.N.J.1994); and *In re Botelho*, 195 B.R. 558 (Bankr.D.Mass.1996).

not seek a judgment for the unpaid principal until more than four years later, outside the three-year window. The creditor's apparent bad faith clearly influenced the *Dawe* court as it concluded that if "recoupment claims were barred by the relevant statute of limitations, lenders could avoid the penalties of the Act by waiting, as here, three years or more to sue on the borrower's default, and thereby frustrate the fundamental policy of TILA." 683 P.2d at 801. In short, the *Dawe* court used a statute of limitations analysis and a strong inference of creditor bad faith with which to justify its rescission of the loan agreement beyond the three-year expiration period.

The *Dawe* court also relied on *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935) to reach its equitable result. In *Bull*, the Court ordered recoupment as an offset of estate taxes mistakenly paid on a transaction, which had been raised as a defense to an IRS suit for the payment of back income taxes on the same transaction. 295 U.S. at 261, 55 S.Ct. at 700. The Court recognized that "[w]hile here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights." *Id.* Thus, as the district court stated, "[r]ecoupment was therefore equitable in nature to prevent an unjust result." *Beach*, 670 So.2d at 990. In contrast, the inequities which undoubtedly influenced the decisions in *Dawe* and *Bull* are not present in the case before us.

The Beaches and the dissent below also place great reliance on our decisions in *Allie v. Ionata*, 503 So.2d 1237 (Fla.1987), *Rybovich Boat Works v. Atkins*, 585 So.2d 270 (Fla.1991), and *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940). However, all of these cases addressed

statutes of limitation and are thus distinguishable. None of the cases addressed a TILA-type statute where the act created the right and provided a remedy.

In *Allie*, petitioner Allie (Ionata's accountant and financial advisor) sold respondent Ionata several parcels of land whose prices Ionata eventually found (several years later) to be severely overinflated. Ionata stopped making payments and sued for restitution and rescission, alleging fraud and breach of fiduciary duty. In response, petitioner Allie pled the four-year statute of limitations as an affirmative defense and counterclaimed for the unpaid balance on two of the notes. At trial, the jury found Allie not guilty of actual fraud, but did find he *breached his fiduciary duty*. On appeal, the Fifth District found respondent Ionata's action on two of the notes barred by the statute of limitations. Upon review, we held that a counterclaim of recoupment of money damages may be asserted even though the underlying claim itself would have been timebarred if raised as a separate cause of action. *Allie*, 503 So.2d at 1239-40.

In *Rybovich*, respondent Atkins entered into a land purchase contract in June 1985 with petitioner Rybovich. Atkins never gave Rybovich the required seven-days' advance notice of the closing date. The closing, which could occur no later than December 1987, never took place. In February 1988, the parties exchanged letters each declaring the other in default. Later that month, Rybovich entered into another contract to sell the property to a third party. Upon hearing of the pending sale, Atkins' attorney informed the title company insuring the sale that Atkins had an interest in said property. Consequently, the title company would not insure the property

against Atkins' claim and the entire transaction failed. Rybovich sued Atkins for breach of contract, tortious interference with the second transaction, and slander of title. Atkins counterclaimed for, among other things, specific performance of the original land sale contract. Rybovich responded that the specific performance claim was barred by the one-year statute of limitations and the trial court agreed.

On certiorari review, the Fourth District relied on *Allie* and quashed the trial court's order. We, in turn, quashed the district court's decision and reinstated the trial court's order, refusing to permit Atkins' assertion of the time-barred claim for specific performance as a defense to Rybovich's damages action. We explained that allowing such a claim "would have the effect of placing a cloud on the title of any real property that was the subject of a failed contract for purchase and sale." *Rybovich*, 585 So.2d at 271. We noted the harshness of specific performance and recognized that "[a]dequate remedies remain available to buyers. . . . " *Id.* at 272. Those remedies included common law rescission of contracts, not statutory rescission as in this case.

In *Beekner*, petitioner Beekner raised the defense of usury (25% interest rate) in a collection action by respondent Cappel to foreclose a mortgage securing notes for a loan. We considered the question of whether the usury defense provided in section 6942, Compiled General Laws (1927), could be precluded by the two-year statute of limitations included in section 4663, Compiled General Laws (1927). We allowed the usury defense, noting that "a contrary holding would enable the lender to purge a usury-infected contract by the simple process of awaiting

the running of the statute of limitations before bringing his suit." *Beekner*, 145 Fla. at 156, 198 So. at 796.

After closely reviewing *Allie*, *Rybovich*, and *Beekner*, we conclude that none of those cases addressed the specific situation found here where a statute simultaneously created a right and its remedy. Furthermore, and just as significantly, the losing party in each of those cases demonstrated bad faith conduct, a factor not present in the case before us. Thus, we find that *Allie*, *Rybovich*, and *Beekner* are not controlling.

Turning to this case, the district court concluded that "[t]o allow the consumer to assert the expired right of rescission in recoupment as a matter of public policy where Congress has not chosen to extend it does not sufficiently provide us with a public policy reason for extending recoupment." *Beach*, 670 So.2d at 993. Moreover, the district court's rationale further distinguishes this case from *Allie* as that case was decided "primarily on considerations of public policy and fairness as well as an analysis of the purpose of statutes of limitation." *Rybovich*, 585 So.2d at 271. We also noted that

> [f]undamental fairness required this result in *Allie*. A contrary holding would have authorized plaintiffs to take advantage of technical quirks in the law to file their lawsuits after defendants' counterclaims have become timebarred. Under such a scheme, even the grossest misconduct by the plaintiff could be excluded from the court's consideration. Statutes of limitation are intended to promote fairness, not to encourage this type of misconduct.

Id. Unlike *Dawe* and *Allie*, no such manipulation of technical defenses occurred in this case. On the contrary, we agree with the district court that the real danger is that borrowers "could take advantage of the remedy throughout the entire life of the secured transaction, rendering the statutory limitation meaningless." *Beach*, 670 So.2d at 991. The Beaches' three-year limit on the right of rescission expired in 1989. They subsequently defaulted in December 1991 and Great Western filed its foreclosure action in June 1992. Great Western exercised its foreclosure rights only after the Beaches failed to meet their obligation. Thus, by making their monthly mortgage payments, the Beaches' had full control over Great Western's "ability to foreclose on its security interest in the residence." *Id.* Furthermore, the Beaches' remedy to the overstatement – damages – was extraneous to the foreclosure action. The savings clause in section 1640 preserved that option beyond the one-year statute of limitations as a "defense by recoupment or setoff."

In contrast, Congress did not include such a savings clause in section 1635 regarding the right of rescission. Indeed, section 1635(f) explicitly provides that *both the right and the remedy expire* three years after the closing date. Thus, as the district court notes, TILA mirrors a statute of repose, not a statute of limitations, 670 So.2d at 992 n. 3, in that it "precludes a right of action after a specified time . . . rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued." *Kush v. Lloyd*, 616 So.2d 415, 420 (Fla.1992).

As a general rule, "[w]here Congress includes particular language in one section of a statute but omits it in

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983). Therefore, despite the Beaches' assertion that section 1635(f) should not be given its plain meaning, we read that section as unambiguously expressing Congress's intent to extinguish the statutory right of rescission three years after the transaction's closing.

Similarly, this Court traditionally has avoided "readings that would render part of a statute meaningless." *Unruh v. State*, 669 So.2d 242, 245 (Fla.1996); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 456 (Fla.1992); *Villery v. Florida Parole & Probation Comm'n*, 396 So.2d 1107 (Fla.1980); *Cilento v. State*, 377 So.2d 663 (Fla.1979). Underlying that caution is our assumption that legislatures do not "enact purposeless and therefore useless, legislation." *Sharer v. Hotel Corp. of America*, 144 So.2d 813, 817 (Fla.1962). Furthermore, "[w]hen the legislature has used a term . . . in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So.2d 911, 914 (Fla.1995); *see also Florida State Racing Comm'n v. Bourquardez*, 42 So.2d 87, 88 (Fla.1949) ("The legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction. . . . ").

More precisely, we have long recognized that "when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of

the right." *Bowery v. Babbit*, 99 Fla. 1151, 1163-64, 128 So. 801, 806 (1930). In *Bowery*, we emphasized that the "statute limiting the time to bring suit . . . is not regarded as a technical statute of limitations." 99 Fla. at 1164, 128 So. at 807. Therefore, *Bowery* controls our interpretation of TILA under Florida law. As we have detailed, *Allie*, *Rybovich*, and *Beekner* all addressed distinct and separate questions of law and thus we are unpersuaded by the Beaches' and the lower court dissent's extensive citation of those cases.

Consistent with *Bowery*, the Fifth Circuit's opinion in *Simon v. United States*, 244 F.2d 703 (5th Cir.1957) reflected federal statutory construction principles when it reasoned:

> A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right.

Id. at 704-05 (quoting 34 Am.Jur. *Limitation of Actions* § 7 (1941)); *see also Maahs v. United States*, 840 F.2d 863, 866 n. 4 (11th Cir.1988) (explaining difference between statutes of limitation and expiration period in Federal Tort Claims Act, which created previously non-existent right to sue government in tort, noting under FTCA "very [sic] right to sue evaporates after the expiration of the stated time"). Thus, as stated in the district court's opinion, "Florida law and federal law appear consistent as to the proper

analysis of this statute." *Beach*, 670 So.2d at 992. We agree with the district court's analysis. Therefore, we hold that under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f).

CONCLUSION

The facts of this case do not compel us to disregard a statute's plain meaning. If "[r]ecoupment is the keeping back of something that is due because there is an equitable reason for holding it[,]" *Williams v. Neely*, 134 F. 1, 5 (8th Cir.1904), the Beaches' claims have little merit. As the district court stated, "[t]he further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years." *Beach*, 670 So.2d at 990.

Accordingly, we approve the decision below and answer the certified question in the negative. We decline to address the other issues raised by the Beaches which were neither in the district court's opinion nor within the scope of the certified question.

It is so ordered.

OVERTON, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.

SHAW, J., recused.

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

District Court of Appeal, Fourth District

WHEREAS, in that certain cause filed in this Court styled:

DAVID R. BEACH, et ux, V.
GREAT WESTERN BANK, etc.

Case No.: **87,835**

Your Case No.: **94-1049**

The attached opinion was rendered on: **February 13, 1997**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Gerald Kogan, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 2nd day of July, 1997.

[SEAL]

/s/ Illegible
Clerk of the Supreme Court of Florida

Supreme Court of Florida

FRIDAY, APRIL 25, 1997

DAVID R. BEACH, et ux., Petitioners, v. GREAT WESTERN BANK, etc., Respondent.	CASE NO. 87,835 District Court of Appeal, 4th District – No. 94-1049

Petitioners' Motion for Rehearing filed in the above cause is hereby denied.

Petitioners' Motion for Attorney Fees and Costs is hereby denied.

Respondent's Motion for Attorney Fees and Costs is granted; the amount to be determined by the trial court. See Fla.R.App.P. 9.400(b), 351 So.2d 981.

KOGAN, C.J., OVERTON, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur

SHAW, J., recused

[SEAL]

A true Copy TC

TEST:

cc: Hon. Marilyn Beuttenmuller, Clerk

By: Illegible
Deputy Clerk

Sid J. White
Clerk, Supreme Court

Hon. Dorothy H. Wilken, Clerk
Hon. Thomas E. Sholts, Judge

Mr. James A. Bonfiglio
Mr. Steven Ellison

MANDATE

from

DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Bobby W. Gunther, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE:	May 12, 1997
CASE NO.: .	94-1049
COUNTY OF ORIGIN:	Palm Beach
T.C. CASE NO.:	CL 92-6071 AG
STYLE:	Beach v. Great Western Bank

A TRUE COPY

/s/ Marilyn Beuttenmuller,
Marilyn Beuttenmuller, Clerk
District Court of Appeal
Fourth District

ORIGINAL TO: Hon. Dorothy H. Wilken, Clerk

cc: James A. Bonfiglio
Steven Ellison

/CR

Supreme Court of Florida

WEDNESDAY, MAY 28, 1997

DAVID R. BEACH, et ux., Petitioners, v. GREAT WESTERN BANK, etc., Respondent.	CASE NO. 87,835 District Court of Appeal, 4th District – No. 94-1049

The Mandate Issued by this Court on April 25, 1997, is hereby vacated.

Petitioners' Motion to Stay Mandate is hereby granted and proceedings in this Court, in the District Court of Appeal, Fourth District, and in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida are hereby stayed for a period of thirty (30) days to allow Petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court.

[SEAL]

A True Copy
TEST:
/s/ Illegible
Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Marilyn Beuttenmuller, Clerk
Hon. Dorothy H. Wilken, Clerk
Hon. Thomas E. Sholts, Judge
Mr. James A. Bonfiglio
Mr. Steven Ellison

Supreme Court, U.S.
FILED
NOV 26 1997
CLERK

(1)

No. 97-5310

In The

Supreme Court of the United States

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

OCWEN FEDERAL BANK,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Florida

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QUESTION PRESENTED

May an action for the statutory right of rescission provided by the Federal Truth in Lending Act, 15 U.S.C. Section 1635, be revived as a defense in recoupment beyond the 3-year limit on the right of rescission set forth in Section 1635(f)?

PARTIES TO THE PROCEEDINGS

David R. Beach, Defendant-Petitioner

Linda M. Beach, Defendant-Petitioner

Great Western Bank, f/k/a

Great Western Savings, Plaintiff/Respondent

Ocwen Federal Bank, Respondent

Ocwen Financial, Inc., parent company of Ocwen Federal Bank

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CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida (J.A. 157) is reported at 692 So. 2d 146 (Fla. 1997). The opinion of the Florida Fourth District Court of Appeal (J.A. 129) is reported at 670 So. 2d 986 (Fla. 4th Dist. Ct. App. 1996). The decision of the Circuit Court of Palm Beach County, Florida (J.A. 35-60) is unpublished.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review a final judgment of the Supreme Court of Florida, pursuant to 28 U.S.C. § 1257. The Supreme Court of Florida issued its decision February 13, 1997, and denied Petitioners' timely motion for rehearing on April 25, 1997. The petition for writ of certiorari in this Court was filed on July 23, 1997, and certiorari was granted on October 14, 1997.

STATUTES INVOLVED

The following statutes and regulations are set forth in the Appendix to this Brief:

15 U.S.C. § 1635

15 U.S.C. § 1640

12 C.F.R. § 226.23(a,f,g,h)

STATEMENT OF THE CASE

A lender sought to foreclose on a mortgage loan in which it had made material errors in Truth in Lending disclosures. The mortgage had been consummated five years earlier. The consumers raised the lender's Truth in Lending Act violations as a defense to the foreclosure suit and requested both rescission and set-off damages as remedies in recoupment. Section 1635 of the Truth in Lending Act (15 U.S.C. § 1635) gives consumers the right to rescind a mortgage by delivering a notice to the lender within three days of the consummation of the loan, and extends the right to rescind up to three years if the creditor fails to deliver the disclosures and notices required by the statute. Most courts which have addressed the three-year provision have held that the time period does not apply when rescission is presented as a defense in an action brought by a lender. *See* n. 5, *infra*, at 14. However, the Supreme Court of Florida concluded that the Act permits defenses seeking recoupment of damages but bars defensive rescission beyond the three years. That court concluded that Congress intended Section 1635 both to limit a consumer's affirmative right to rescind a mortgage to three years and to bar consumers from seeking rescission in recoupment when a lender who has violated the Act attempts to foreclose on a loan after more than three years.

A. Rescission Under the Truth-in-Lending Act.

Congress enacted the Truth-in-Lending Act in 1968 to remedy divergent and often fraudulent consumer lending practices. *See Mourning v. Family Publications Services Inc.*,

411 U.S. 356, 363-367 (1973). The statute requires lenders to clearly and conspicuously disclose the critical terms of a credit agreement, facilitates competition among lenders and comparison shopping by consumers, and protects consumers against unfair credit practices. 15 U.S.C. § 1601(a).

Among other provisions, the Act requires that lenders clearly and conspicuously disclose the finance charge, annual percentage rate, and other terms specified by Congress and the Federal Reserve Board. §§ 1631, 1632, 1638. If the loan is secured by the consumer's home, the lender must also clearly and conspicuously disclose that the consumer has the right to rescind the transaction. § 1635. On such loans, the consumer has an absolute right to reconsider and rescind the agreement for three business days following the day of the transaction or the day of delivery of the forms setting forth the consumer's right to rescind and the material disclosures required by the Act, whichever is later. § 1635(a). Rescission is accomplished by simply delivering a notice to the lender. Rescission returns the parties to their status before the closing. The mortgage is canceled, the security interest "becomes void," and the lender is required to return any down payment or earnest money. § 1635(b). The consumer, in turn, is excused from liability for finance charges or other charges, 12 C.F.R. § 226.23(d)(1-4), and is required to return the principal.

As originally enacted, the three-day limitation period was extended until the proper disclosures and notices were delivered, if the lender failed to make the required disclosures or failed to adequately notify the consumer of the right to rescind. In 1974, in response to reports that

allowing this right to extend indefinitely until required disclosures have been made clouded the title to residential properties, Congress added § 1635(f), which provides that the consumer's "right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this part have not been delivered." Pub. L. 93-495, 88 Stat. 1517, § 405(f) (now codified, as amended, as 15 U.S.C. § 1635(f)).[1]

A separate section of the Act, Section 1640, authorizes consumers to bring private civil actions for actual damages, statutory damages, and enforcement of the rescission provision. 15 U.S.C. § 1640(a). Actions for such relief must be brought within one year from the date of the violation. However, violations of the Act may also be raised defensively by way of recoupment or set-off when a consumer is sued by a lender. Prior to 1980, there was a split in authority over whether the one year limitation on civil actions also barred raising violations of the Act as a recoupment defense in collection proceedings.[2] In 1980,

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[1] Additional amendments to § 1635(f) in 1980 allowed consumers to rescind more than three years after the transaction if a government agency had initiated a successful enforcement proceeding before the three-year period expired. Pub. L. 96-221, 94 Stat. 176, § 621(a)(6).

[2] *Compare Household Consumer Discount Co. v. Vespanziani*, 490 Pa. 209, 415 A.2d 689 (1980) (limitation period does not bar recoupment); *Household Finance Corp. v. Pugh*, 288 N.W.2d 701 (Minn. 1980) (same); with *Devlin v. Aetna Finance Co.*, 379 So. 2d 972 (Fla. 5th Dist. Ct. App. 1979), *cert. denied*, 389 So. 2d 1108 (Fla. 1980).

Congress resolved the dispute in favor of consumers by amending Section § 1640 to provide explicitly that the one-year limitation period does not preclude raising violations of the Truth in Lending Act more than one year from the date of the violation "as a matter of defense by recoupment or set off" in an action brought to collect a debt. 15 U.S.C. § 1640(e).

In 1995, Congress amended the Truth in Lending provisions on rescission in response to the Eleventh Circuit's decision in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994), *abrogated on other grounds, Veale v. Citibank, F.S.B.*, 85 F.3d 577 (11th Cir. 1996). Mortgage lenders sought relief from *Rodash* because its holding was characterized as meaning that consumers could rescind mortgages based solely on minor, technical violations of the Act. *See, e.g.*, 141 Cong. Rec. 4120 (daily ed. Sept. 27, 1995) (statement of Rep. Roukema). In response, Congress imposed a six-month moratorium on certain types of class actions and used that time to negotiate a "compromise to a highly technical problem." 141 Cong. Rec. S14566-67 (Sept. 28, 1995) (comments of Sen. D'Amato); *see also* 141 Cong. Rec. H9515 (Sept. 27, 1995) (comments of Rep. Gonzalez) ("I want to emphasize that this bill is a compromise."). The resulting Amendments protect lenders by expanding the tolerance for inaccurate statements of finance charges and providing immunity for errors on pre-Amendment loans which otherwise would give rise to liability under the Act. *See* Pub. L. 104-29, 109 Stat. 271 (1995). However, the Amendments limit the use of this new immunity if the lender forecloses, by giving consumers faced with foreclosure the right to rescind in circumstances where the new tolerances or immunity

would otherwise foreclose liability. Thus, the 1995 Amendments created two different standards for rescission depending on whether it arises affirmatively or as a defense. When the consumer acts affirmatively to rescind, the standards in Section 1635(f) and 1649 govern. However, when rescission in recoupment is raised a defense in foreclosure proceedings, the standards in Section 1635(i) apply and permit rescission in circumstances where it otherwise would not be allowed.

For example, the Amendments provide that misstatements in the finance charge for mortgage disclosures shall be treated as accurate if the errors are within certain tolerances. 15 U.S.C. § 1605(f). But if a foreclosure proceeding has been commenced, the consumer has the right to rescind, even if the error is within the 1995 Amendment tolerances, if the finance charge is misstated by more than $35. § 1635(i)(2). In addition, the 1995 Amendments generally immunize lenders from liability on pre-Amendment loans if the lender failed to include certain charges or fees in the finance charge or failed to use the appropriate form to notify the consumer of the right of rescission. § 1649(a)(1), (a)(2). However, in a foreclosure proceeding a consumer may exercise rescission rights based on most of these errors. § 1635(i)(1).

After setting forth these special rights to rescission in foreclosure under the statute, the 1995 Amendments also state that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." § 1635(i)(3). The statute also contains a more general provision on preservation of state law, which dates from 1980, and provides that, "[e]xcept as specified in sections 1635, 1640, and 1660 of this title, this subchapter

and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law." 15 U.S.C. § 1610(d).

B. Petitioners' Mortgage and the Proceedings Below

In 1986 Petitioners David and Linda Beach built a home with a mortgage and construction loan financed by First Fidelity Savings and Loan. After construction was completed and they occupied the home, Petitioners refinanced through a loan from Great Western Bank. Great Western later changed its name to Ocwen Federal Bank. Great Western provided the Beaches with Truth in Lending Act disclosure statements and notice of the right to rescind, but the disclosure statements misstated the finance charge, the amount financed and the annual percentage rate of the loan, in violation of 15 U.S.C. § 1638(a)(3), (4) & (5).[3]

Petitioners made their monthly installment payments on the loan until December 1991, when they defaulted. Great Western instituted foreclosure proceedings in June 1992, and Petitioners raised Great Western's violation of the Truth in Lending Act as an affirmative defense to the foreclosure action, arguing that the violations entitled

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[3] Respondent (Great Western) overstated Petitioners' monthly mortgage payment by fifty-eight cents ($0.58), resulting in a $201.84 overcharge. Respondent also overstated the finance charge by $7.24. J.A. 159. Those errors satisfy the definition of material disclosure errors. *See* 15 U.S.C. § 1602(u); 12 C.F.R. § 226.23, n. 48, *infra* App. 15a.

them to rescind and to reduce Great Western's claim by the amount of their damages under the Act.

The trial court agreed that Petitioners were entitled to raise the Truth in Lending violations defensively, found that Great Western had violated the Act, and ruled that Petitioners were entitled to offset their damages from this violation against the balance due Great Western. However, the trial court concluded that rescission in recoupment was not available to Petitioners for these violations because of the three-year limitation period in 15 U.S.C. § 1635(f). J.A. 54-81. In a divided opinion, Florida's Fourth District Court of Appeal affirmed the trial court's ruling that Section 1635(f) bars rescission in recoupment after three years, and certified the question to the Supreme Court of Florida.[4] J.A. 129-153.

The Supreme Court of Florida acknowledged that federal and state courts, including Florida courts, had repeatedly recognized that " '[i]t is well established that the defense of recoupment may be asserted defensively where the underlying claim is barred by the statute of limitations.' " J.A. at 165 (quoting *Willoughby v. Dowda & Fields, Chartered*, 643 So. 2d 1098, 1099 (Fla. 5th Dist. Ct. App. 1994). But the Supreme Court of Florida concluded that Section 1635(f) forecloses such a recoupment defense

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[4] The trial court had concluded, in the alterative, that the transaction was not subject to rescission because it fell within one of the statutory exemptions. J.A. 73-74. On review, the Florida District Court of Appeal disagreed, stating "this is not an exempt transaction." J.A. 133. The Supreme Court of Florida did not disturb that conclusion.

because "we read that section as unambiguously expressing Congress's intent to extinguish the statutory right of rescission three years after the transaction's closing." J.A. 171. The court based this conclusion on Congress' failure to include a clause in Section 1635 stating that rescission could be raised in recoupment beyond the three-year period. *Id.* The court reasoned that, because Congress had included a savings clause expressly preserving damages in recoupment beyond the limitations period in Section 1640(e), the court should presume that the omission of such a clause in Section 1635(f) implies that subsection (f) rescission limitations do apply to recoupment. Based on this construction of the statute, the court concluded that a defense based on rescission beyond the three-year period in Section 1635(f) was precluded.

The 1995 Amendments to the Truth in Lending Act, including the provision stating that nothing in the statute "affects a consumer's right of rescission in recoupment under State law," were enacted while this case was pending before the Florida District Court of Appeal. Those Amendments "apply to all consumer credit transactions in existence or consummated on or after the date of the enactment" of the Amendments, September 30, 1995. 15 U.S.C. § 1635(i)(4). However, both the District Court of Appeal and the Supreme Court of Florida concluded that the Amendments had no bearing on their rulings and relegated the Amendments to footnotes. *See* J.A. 130 (n.1), J.A. 164 (n. 6).

Certiorari was sought because the decision of the Supreme Court of Florida conflicted with decisions of other courts which have held that rescission in recoupment could be asserted by a consumer as an affirmative

defense more than three years after the transaction occurred.

SUMMARY OF ARGUMENT

This Court has emphasized that statutory limitation periods generally do not apply to defenses such as recoupment and that courts should not construe statutes to bar such defenses absent " 'the clearest congressional language' " showing that Congress intended to depart from the general rule. *Reiter v. Cooper*, 507 U.S. 258, 265 (1993) (*quoting United States v. Western Pac. R. Co.*, 352 U.S. 59, 71 (1956)). This presumption that defenses are generally not foreclosed arises from the fact that where a suit has already been brought, courts should be permitted to examine, and render a decision on, the entire transaction. Courts should not be precluded from considering evidence that the plaintiff violated the law in the transaction for which the plaintiff seeks a recovery.

The decision below wholly ignores this rule of construction. The Truth in Lending Act does not contain any language which could be construed as a clear statement that Congress intended to restrict the ability of consumers to assert rescission defensively based on violations of the Act. To the contrary, the language of the statute seeks to protect consumers' ability to raise this defense, not restrict it. *See* 15 U.S.C. §§ 1635(i), 1640(e). The 1995 Amendments confirm that Congress did not intend to place restrictions on the defense of recoupment in foreclosure. The three-year limitation in Section 1635(f) applies to the consumers' right to rescind a loan by

delivering a written notice; it does not address or purport to limit the availability of rescission as a defense when a lender brings foreclosure proceedings on a loan made without the accurate disclosures required by the Truth in Lending Act. Indeed, the Supreme Court of Florida's analysis shows that it could not find any clear expression of congressional intent to limit recoupment; it resorted instead to a negative inference to imply a restriction which Congress did not impose. *But see Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 (1980) ("[C]aution must temper judicial creativity in the face of legislative or regulatory silence").

By erroneously viewing Section 1635(f) as a three-year bar to rescission in recoupment, the Supreme Court of Florida denied Petitioners the ability to raise the recoupment defense recognized under both Florida and federal law. Florida law recognizes that rescission can be raised defensively through recoupment, even if a statutory limitation would bar an affirmative action for rescission, and there is no basis in Florida law for denying that defense for violations of the Truth in Lending Act. Moreover, federal law generally recognizes that defendants may raise otherwise barred federal claims as recoupment defenses in order to protect federal rights and prevent plaintiffs from enforcing contracts which violate federal law. The Section 1635 statutory right of rescission should be available to a consumer as a defense in recoupment in a foreclosure action, even if raised more than three years after the consummation of the loan. That result would be consistent with the universally applied liberal construction of the Truth in Lending Act in favor of consumers.

ARGUMENT

I. SECTION 1635(f)'S THREE-YEAR LIMIT ON THE RIGHT OF RESCISSION DOES NOT BAR THE DEFENSE OF RECOUPMENT BASED ON RESCISSION

It has long been recognized that statutory limitation periods generally do not apply to defenses, including recoupment, and thus, such defenses may be raised at any time in response to a claim arising out of the same transaction. *Bull v. United States*, 295 U.S. 247, 262 (1935). Statutory limits should not be construed to bar such defenses absent " 'the clearest congressional language' " showing that Congress intended to bar defenses as well as affirmative suits. *Reiter v. Cooper*, 507 U.S. 234, 265 (1993) (*quoting United States v. Western Pac. R. Co.*, 352 U.S. 59, 71 (1956)). No such language exists in the Truth in Lending Act. To the contrary, as we show below, the statute specifically preserves a consumer's right of rescission in recoupment.

A. Both State and Federal Law Recognize that Defenses, Including Rescission in Recoupment, are Not Subject to Statutory Limitation Periods.

"Recoupment" is a widely recognized common law defense. It allows a defendant to raise a claim defensively solely for the purpose of reducing or satisfying the plaintiff's claim. *See Distribution Serv., Ltd. v. Eddie Parker Interest, Inc.*, 897 F.2d 811, 812 (5th Cir. 1990); *Matter of Coxson*, 43 F.3d 189, 193 (5th Cir. 1995). Moreover, the defendant's recoupment claim must arise out of the same transaction

as the plaintiff's suit; the defendant cannot use recoupment to expand the suit to address other transactions between the parties. *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946) (taxpayer not permitted to claim recoupment based on tax liability in other years as a defense to the government's tax deficiency suit for a specific year). The recoupment defense has long been recognized in federal law and state law as a common law doctrine, available without any statutory authorization. *See Dushane v. Benedict*, 120 U.S. 630, 644 (1887).

"[B]ecause recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded," recoupment "is never barred by the statute of limitations so long as the main action itself is timely." *Bull v. United States*, 295 U.S. 247, 262 (1935). Thus, in *Bull* this Court held that even though the statute of limitations barred a taxpayer from bringing a suit against the government to recover on an overpayment of taxes, common law recoupment permitted the claim to be raised by the taxpayer in defending an action brought by the government. *Id.* Indeed, this Court recently reaffirmed this principle in *Reiter v. Cooper* and emphasized that it is a "general principle" that applies unless there is express language that bars recoupment. 507 U.S. 263, 264.

Recoupment is not subject to such limitation periods for two reasons, both of which support recognition of rescission in recoupment for Truth in Lending violations. First, it would be unfair to allow a court to consider and enforce the plaintiff's claim without considering the plaintiff's own wrongdoing in the same transaction. Recoupment permits "a transaction which is made the

subject of suit by plaintiff to be examined in all its respects, and judgment to be rendered that does justice in view of the one transaction as a whole." *Rothensies*, 329 U.S. at 299. Thus, for example, when a carrier brings a claim for shipping charges, the statute of limitations cannot be used to bar the defendant from showing that the charges were excessive. *United States v. Western Pac. R. Co.*, 352 U.S. at 59. Similarly, a fraud claim which is otherwise barred can be raised defensively if a suit is brought to enforce the contract that was tainted by fraud. *See In re Holford*, 896 F.2d 176, 178 (5th Cir. 1990).

Second, as this Court observed in *Western Pacific*, the "basic policy behind statutes of limitations has no relevance" to recoupment claims. 352 U.S. at 72. Statutes of limitations are "designed to keep stale litigation out of the courts," but recoupment can only be raised if there is already a suit involving the same parties and the same transaction. "We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of applicable law." *Western Pacific*, 352 U.S. at 72.[5]

Both of these considerations apply here and, under general common law principles, a recoupment defense based on rescission should be available for the Truth in

[5] For other cases permitting time-barred claims to be raised as a defense in recoupment, *see, e.g., Luckenbach S.S. Co. v. United States*, 312 F.2d 545 (2nd Cir. 1963); *118 East 60th Owners, Inc. v. Bonner Properties, Inc.*, 677 F.2d 200 (2d Cir. 1982); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3rd Cir. 1995); *Crossett Lumber Co. v. United States*, 87 F.2d 930 (8th Cir 1937).

Lending claims at issue here at any time, regardless of the statute of limitations. In order to fairly adjudicate the transaction as a whole, a court must be able to consider a consumer's claim that the loan which the lender seeks to enforce is subject to rescission because the lender failed to accurately make the disclosures required by law.

Moreover, barring the rescission defense after three years does not keep stale issues out of court. Indeed, the issues surrounding the original transaction must be addressed in deciding the recoupment claims for damages based on the same violations of the Act – damage claims that all parties agree are not barred because 15 U.S.C. § 1640(e) expressly provides that the one-year statute of limitations does not bar a "defense by recoupment or set-off." For example, in this case, the trial court adjudicated all of the allegations that Great Western violated the Act in order to decide the damages recoupment claim in Petitioners' favor, even though the court ruled that rescission in recoupment was barred.[6] Accordingly, the rule that a recoupment defense is generally not barred by the passage of time if the main action is timely, *see, e.g., Reiter*, 507 U.S. at 264; *Bull*, 295 U.S. at 262, should apply to Truth in Lending Act violations in this case, since Congress has not stated a clear directive to the contrary.

The Supreme Court of Florida also suggested that Section 1635(f) bars defensive rescission in recoupment

[6] Therefore, Petitioners contend that based on the rulings awarding damages in recoupment, they would also be entitled to rescission as a matter of law but for the erroneous ruling below that the rescission remedy was time barred.

because " 'the right and the remedy are created by the same statute. . . . ' " J.A. at 171-172 (quoting *Bowery v. Babbit*, 99 Fla. 1151, 1163-1164, 128 So. 801, 806 (1930). This analysis, however, confuses the role of federal law and Florida law, and is flawed for two reasons.

First, as this Court has emphasized, the question of whether a limitation period applies does not depend on whether the limitation provision appears in the same statute that creates the right. The critical issue is not the form of the statute, but congressional intent. Thus, in *Burnett v. New York Central R. Co.*, 380 U.S. 424, 426-27 (1965), this Court rejected the argument that the limitation period in the Federal Employees Liability Act is not subject to tolling because it is not "procedural" but is a "substantive" limitation contained in the same Act which creates the right being limited. "The basic question to be answered," this Court observed, "is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.' " *Id.* at 426 (quoting *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 360 (1943)). Congressional intent, as reflected in the "purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of rights given by the Act," showed that tolling was permitted. *Id.* at 427-28. For the same reason, in this case, the applicability of Section 1635(f) turns on congressional intent, and congressional intent is a federal question that must be determined as a matter of federal law.

Second, the court below relied on a line of cases that involved barring affirmative claims, not defensive recoupment. The Florida and federal decisions cited by

the court below conclude that the time for bringing an affirmative claim that would otherwise be barred should not be tolled where the statute creating the right sets the limitation period. J.A. 172 (citing *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957) (time for filing suit is not tolled by disability); *Maahs v. United States*, 840 F.2d 863, 866 n. 4 (11th Cir. 1988) (rules for extensions and tolling of time to file suit that apply to normal statutes of limitations do not apply to 28 U.S.C. § 2401(b)). However, this Court's decision in *Western Pacific* makes clear that the defense of recoupment is not subject to the same limitation. *Western Pacific*, 352 U.S. at 72-73; *see also Distribution Serv., Ltd. v. Eddie Parker Interests, Inc.*, 897 F.2d 822, 813-14 (5th Cir. 1990) (decisions involving application of limitation period to affirmative claim do not apply to defensive claims of recoupment). To construe Congress' intent in Section 1635(f), the Court must look to federal law, and *Western Pacific* makes clear that the line of decisions that the court below relied upon are not applicable here because federal law provides that defenses are not foreclosed by statutory limitations unless Congress has clearly expressed its intention that defenses should be barred.

B. The Truth in Lending Act Does Not Contain the Clear Statement Necessary to Impose a Three-Year Limitation on the Defensive Use of Rescission in Recoupment.

Western Pacific and *Reiter, supra*, make clear that statutes may be construed to bar recoupment only if Congress has stated its intention to do so in clear,

unambiguous terms. In *Western Pacific* this Court emphasized that "[o]nly the clearest congressional language could force us to a result" that would allow the two-year limitation period in the Interstate Commerce Act to bar reference of a recoupment claim based on that Act. 352 U.S. at 71. Because the limitation period in the statute did not specifically address recoupment or referral, it could not be interpreted to bar such a claim:

> On its face [the statute of limitations] has to do only with the commencement of actions or reparation proceedings before the Commission. There is therefore no language which militates against the conclusion that the statute does not apply to referrals.

Id. at 72. Indeed, this Court emphasized that the result would be the same even if the limitation period was jurisdictional. The critical question is "whether Congress intended it to apply to referrals as well as affirmative suits," and in the absence of clear language to the contrary a limitations statute should not be extended to bar "defenses in actions properly and timely brought." *Id.* at 73.

In *Reiter*, the Court reaffirmed this rule and emphasized that it is based on general principles. The Court held that recoupment is available as long as the main action is timely and repeated *Western Pacific*'s admonition that recoupment should be barred only by " 'the clearest congressional language.' " 507 U.S. at 264. (quoting *Western Pacific*, 352 U.S. at 71.)

Nothing in the Truth in Lending Act provides a clear statement of any congressional intent to make rescission

in recoupment subject to the three-year limitation in Section 1635(f). To the contrary, review of the entire Act and its history shows that where Congress has explicitly addressed recoupment, it has sought to preserve or extend consumers' ability to raise Truth in Lending violations as a defense, rather than to limit such defenses.

1. **The Pre-1995 Statutory Language.** The language of the Act, even prior to the 1995 Amendments, does not provide any clear statement of congressional intent to bar recoupment after three years. Prior to the 1995 Amendments, Section 1635 contained no mention of recoupment and no language stating or even suggesting that this Section was intended to limit recoupment. Indeed, the only language in the statute concerning recoupment prior to the 1995 Amendments appears in Section 1640(e) and states that the one-year limitation on bringing a civil action does not bar a defendant from raising a violation of the Act "as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law," even if the main suit is brought long after the limitation period has elapsed. § 1640(e).

This language does not indicate any intent, much less a clear attempt, to bar rescission in recoupment. Like the language at issue in *Western Pacific*, Section 1635(f) simply does not deal with defenses or recoupment. Instead, this provision addresses an extra-judicial, self-effectuating procedure for rescinding a loan. Because it "does not deal with" recoupment, Section 1635(f) does not provide any indication that Congress intended to limit rescission in recoupment. *Cf. Western Pacific*, 352 U.S. at 72.

Section 1640(e) reinforces this conclusion. Section 1640(e) explicitly states that once an action is brought to enforce a debt, unless otherwise provided by State law, claims that were barred by the one-year limitations period may be revived "as a matter of defense by recoupment or set-off in such action." 15 U.S.C. § 1640(e). This language preserves the right of recoupment without qualification; it does not limit consumers to recoupment based on damages. Indeed, nothing in the statute suggests that recoupment based on rescission is excluded from this savings clause, or that Congress intended to impose a special limitation on such claims. The court below, by inferring a three-year bar on rescission by recoupment, violated the admonition of this Court, specifically addressing judicial activism in interpreting the Truth in Lending Act. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 (1980) ("[C]aution must temper judicial creativity in the face of legislative or regulatory silence").

2. **The 1995 Amendments.** The 1995 Amendments to the Truth in Lending Act confirm that the Act is not intended to restrict the availability of rescission in recoupment by explicitly providing that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." *Id.* 1635(i)(3). As discussed above, subsection 1635(i) was added in 1995 to provide that, in foreclosure situations, consumers may exercise rescission rights even where the lender is immune from liability in an affirmative action because of the tolerances and limits on liability in the Act. *See, supra*, at 6. To make clear that the rescission rights set forth in subsection 1635(i) are a floor and not a ceiling, § 1635(i)(3)

explicitly states that this subsection does not affect rescission in recoupment under State law.[7]

Moreover, the 1995 Amendments added limitations on the circumstances in which consumers could affirmatively seek rescission. *See* 15 U.S.C. §§ 1605(b), 1635(h). However, Congress did not add any language suggesting that the

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[7] Contrary to the conclusion of the court below (J.A. 164-165, n. 6), the 1995 Amendments to Subsection 1635(i) do apply to petitioners' mortgage since the statute applies to all consumer transactions "in existence" on September 30, 1995. The litigation in state courts continued through 1997, and the Final Judgment of Foreclosure was not final until then. Thus, the loan was "in existence" during the state court appellate process.

Although the court below recalled the mandate for a 30-day period to permit a petition for writ of certiorari (J.A. 179), the petition was not filed within that period and this Court denied Petitioners' application for a stay pending review. The property was sold through a foreclosure sale prior to the date certiorari was granted, and Petitioners no longer live in the home which is the subject of the mortgage loan in this case.

The foreclosure sale does not deprive this Court of jurisdiction on mootness grounds. *See Gaines v. Continental Mortgage and Investm. Corp.*, 865 F.2d 375, 378 (D.C. Cir. 1989) (where appellants, if successful, could re-open judgment below and obtain "meaningful relief," appeal was not moot). Here, federal and Florida law would provide meaningful relief to Petitioners, if they prevailed. Section 1640(a)(1,2) would provide damages, and Florida law requires that the foreclosure sale be set aside. *See American Bankers Life Assurance Co. v. Williams, Saloman, Kanner & Damian*, 399 So. 2d 365, 367 (Fla. 3d DCA 1981) ("It is no bar to restitution that American Bankers sold the property to another"); *Sundie v. Haren*, 253 So. 2d 857, 858 (Fla. 1971) (even without a supersedeas bond, "[a] party against whom an erroneous [foreclosure] judgment has been made is entitled upon reversal to have his property restored to him by his adversary").

three-year limitation in subsection 1635(f) bars defensive rescission in recoupment brought more than three years after the transaction. Rather, Congress explicitly provided that the special rights to assert rescission in recoupment under the circumstances set forth in Section 1635(i)(1) and (i)(2) are subject to a three-year limitation period, but it did not make rescission in recoupment subject to this three year limitation in circumstances outside of Section (i)(1) and (2), that is, where the violation does not fall within the tolerances or immunity set forth in Sections 1605 and 1649. Instead, subsection 1635(f) was unaffected by the 1995 amendments. Indeed, Congress' decision not to amend Section 1635(f) to extend its three-year limitation to all defensive use of rescission in recoupment is particularly important because by the time of the 1995 Amendments a number of courts, including the Supreme Court of Colorado, had held that subsection 1635(f) did not apply when rescission is raised in recoupment " 'because recoupment is in the nature of a defense.' " *Dawe v. Merchants Mortgage and Trust Corp.*, 683 P.2d 796, 801 (Colo. 1984).[8] The 1995 Amendments do nothing to undermine the prevailing judicial view that the three-year limitation does not apply to defensive use of rescission in recoupment, and reflect a congressional effort to protect the availability of rescission in recoupment – not a clear intent to limit it.

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[8] *See also In Re Botelho*, 195 B.R. 558 (Bankr. D. Mass. 1996); *Federal Deposit Insurance Corp. v. Ablin*, 177 Ill. App.3d 390, 126 Ill. Dec. 694, 532 N.E.2d 379 (1988); *Community National Bank & Trust Co. v. McClammy*, 138 A.D.2d 339, 525 N.Y.S.2d 629 (N.Y. App. Div. 1988).

3. Drafting History. The drafting history of the 1995 Amendments reinforces the conclusion that Congress did not intend to extend the three-year limitation in Section 1635(f) to the defense of rescission in recoupment. Early drafts of the bill that eventually was passed as the 1995 Truth in Lending Act Amendments contained language that would have met the *Western Pacific* and *Reiter* standard by barring rescission in any context after three years.[9] The proposed language explicitly barred

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[9] *See, e.g.*, H.R.1184, § 7, 104th Cong., (1995), which provided:

> SEC. 7. LIMITATION ON RESCISSION PERIOD.
>
> Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following sentences:
>
> "The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of the 3-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection."

Identical or virtually identical provisions appeared in other bills considered by Congress and congressional committees during this period to limit the availability of rescission in response to the Eleventh Circuit's decision in *Rodash*. *See* H.R. 1858, 104th Cong., 1st Sess., Financial Institutions Regulatory Relief Act of 1995, § 111 (introduced June 15, 1995); H.R. 1362, Financial Institutions Regulatory Relief Act of 1995, 104th Cong., 1st Sess., § 117 (introduced March 30, 1995); S. 650, Economic Growth and

consumers from raising rescission "affirmatively or as a defense" after three years, and preempted state law. However, the proposed language was deleted from the bill before final passage and does not appear in the legislation. *See* 141 Cong. Rec. H9513-14 (daily ed. Sept. 27, 1995). This history buttresses the conclusion that the statute contains no clear statement barring rescission in recoupment after three years because Congress removed language that would have imposed such a bar from the proposed amendments. As this Court has observed, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *Arizona v. California*, 373 U.S. 546 (1962). The Court should not imply into the statute the very provision Congress decided not to pass in 1995. *Cf. Heintz v. Jenkins*, 514 U.S. 291, 294-205 (1995) (refusing to imply an exemption for lawyers into the Fair Debt Collection Practices Act).

4. The Decision Below. In the decision below, the Supreme Court of Florida did not apply the teaching of this Court in *Reiter* or *Western Pacific*, nor did it consider the 1995 Amendments. Instead, the court concluded that Congress intended to extinguish the statutory right of rescission because the one-year limitations period for affirmative actions, 15 U.S.C. § 1640(e), includes a savings clause to preserve recoupment, but Congress did not include such a savings clause in the statute's section on rescission, 15 U.S.C. § 1635. J.A. 170-171. This reasoning,

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Regulatory Paperwork Reduction Act of 1995, 104th Cong., 1st Sess., § 117 (introduced March 30, 1995).

in which the court inferred a bar from the *absence* of statutory language, incorrectly applies the applicable principles.

First, rather than look for "the clearest congressional language," the Florida court inferred intent from silence based on the maxim that when Congress puts language in one section of a statute and omits it from another section it is generally " 'presumed' " that the omission was intentional. J.A. 170-171 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). However, both *Reiter* and *Western Pacific* indicate that it is improper to rely on such speculative inferences when deciding whether recoupment is barred by a statute. To the contrary, this Court's cases hold that statutory limitation periods do not apply to defenses, including recoupment, unless the statute explicitly states otherwise. *See Reiter; Western Pacific; Bull.*

Moreover, Sections 1640(e) and 1635(f) are not parallel provisions which warrant the inference that a savings clause in one means that Congress intended to bar claims covered by the other provision. Section 1640(e) imposes a limit on when actions may be brought in court; Section 1635(f) imposes a limit on the extra-judicial procedure for rescinding a transaction. There is nothing irrational in Congress adding a clause on defenses to the section which discusses judicial actions, but not adding parallel language to a section (1635(f)), which does not explicitly address judicial proceedings. The Supreme Court of Florida's conclusion that Congress' failure to enact a savings clause *implies* a bar on rescission in recoupment reads too much into the statute and is not based upon a clear statement of congressional intent.

In addition, implying terms from a comparison of the two provisions is inappropriate because each was adopted at different times to address different issues. The savings clause in Section 1640(e) was adopted in 1980 to resolve a split which had developed among courts concerning whether recoupment defenses for damages were subject to the one-year limitations period in favor of allowing recoupment. *See* Pub. L. 96-221 § 615(a)(4), 94 Stat. 180 (1980). Section 1635(f) did not present any such issue. To the contrary, prior to the Supreme Court of Florida's decision below, courts had uniformly agreed that the three-year period in § 1635(f) does not limit rescission in recoupment. *See supra* p. 14, n. 5. When Congress added § 1635(i) in 1995, the amendment reaffirmed that Congress intended to preserve, not preempt, recoupment under state law.

5. **The Truth in Lending Act's Policy in Favor of Recoupment.** A strained effort to apply the three-year limitation period to cover rescission in recoupment, despite the absence of statutory language imposing such a limit, is inconsistent with the policies underlying the Truth in Lending Act. Truth in Lending violations are often not discovered until the borrower is sued in foreclosure and consults a lawyer. *See Dawe*, 683 P.2d at 801. But, if rescission in recoupment claims were barred by Section 1635(f), lenders which commit violations of the Act could avoid the consequences of rescission and enforce otherwise unenforceable loans by simply delaying the foreclosure proceedings until three years after the transaction. Such a rule would allow creditors to escape the consequences of a Truth in Lending Act violation simply because the three years had passed.

Congress has made clear that it favors the defensive use of the Act in foreclosure proceedings and has protected defensive use of the Act even in situations where affirmative relief is not available. The provisions of the Act which address defenses do not curtail the ability of consumers to raise violations as a defense, but place defensive use, including rescission in recoupment, on a special footing that allows it to be used to rescind loans or seek offset damages in circumstances where the lender would not otherwise be liable. *See* 15 U.S.C. § 1635(i). Construing Section 1635(f) as a limitation on rescission in recoupment is not only unsupported by the statutory language, but is inconsistent with the general Truth in Lending policy of favoring such defenses.

The Supreme Court of Florida suggested that it was inequitable to allow consumers to rescind three years after the transaction. J.A. 169-170. Nothing in the statutory language, however, reflects such a determination. To the contrary, it is equitable to allow consumers to rescind when creditors materially misstate the terms of a loan. In that instance, consumers cannot use the three days to evaluate their decision to enter into the loan, because the lender never provided accurate information about the loan. *In re Porter*, 961 F.2d 1066, 1078 (3d Cir. 1992) ("[B]orrowers who take out consumer loans should have the chance to rethink those transactions if the titles to their homes will be put at risk. *See* for example, S. Rep. No. 96-368, 96th Cong., 2d Sess. 28, reprinted in 1980 U.S. Code Cong. & Admin. News 236 264"). When a foreclosure proceeding is brought more than three years after the closing, rescission in recoupment is equitable to both parties, especially when consumers are faced with the

loss of their homes. The creditor is prevented from enforcing a loan that it obtained in violation of federal law; the consumer is not forced to lose a home based on terms that the consumer thought were present, but were not, because of erroneous disclosures; and creditors are entitled to recover the entire principal provided to the consumer, while financing charges collected by the lender are returned to the consumer.

Allowing consumers facing foreclosure to raise rescission in recoupment more than three years after the transaction encourages lenders to comply with the Act. If rescission is absolutely barred after three years, lenders would be encouraged to understate finance charges and annual percentage rates to undercut competitors and close more loans, but they would not be subject to rescission if the errors are not discovered until the three-year period has expired. In addition, a lender that discovers that it has made disclosure errors, particularly systematic errors affecting many loans, will have a strong incentive not to provide corrected disclosures to consumers until the three-year period has expired. Thus, barring rescission as a defense in recoupment would encourage Truth in Lending violations and ultimately would frustrate the Act's purpose. *Cf. Rodash, supra* (Truth in Lending Act should be liberally construed in favor of the consumer); *Clark v. Troy and Nichols, Inc.*, 864 F.2d 1261, 1265 (5th Cir. 1989) (same, noting the "universally applied principle of liberally construing the terms of the Truth in Lending Act to effectuate the underlying purpose of consumer protection").

II. INDEPENDENT OF THE ACT, FLORIDA AND FEDERAL LAW PROVIDE FOR RESCISSION IN RECOUPMENT AS A DEFENSE TO RESPONDENT'S CLAIMS.

A. Florida Law Provides for Rescission in Recoupment; the Decision Below Erroneously Construes Congressional Intent.

In its opposition to certiorari, Respondent argued that the decision was based solely on Florida law and did not present a federal question. This Court's decision to grant certiorari implicitly rejects this claim, and examination of the Florida court's opinion demonstrates that construction of federal law determined the outcome. Florida law recognizes recoupment as a defense and recognizes that rescission may be asserted as a recoupment defense. The Supreme Court of Florida's decision that such recoupment is not permitted was based on its determination that federal law barred the defense of rescission in recoupment three years after the transaction.

It is well established in Florida law that a defense of recoupment may be asserted even though the claim on which it is based is barred by the applicable statute of limitations. *See Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1987); *Rybovich Boat Works v. Atkins*, 585 So. 2d 270 (Fla. 1991); *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940). In *Allie*, the court held that a recoupment defense could be used to request rescission of contracts for sale of land and restitution, even though the defendant was time-barred from bringing an independent suit on these claims. *Allie v. Ionata*, 503 So. 2d at 1239-1240. In *Rybovich Boat Works v. Atkins*, the court held that the defense of

recoupment could not be used to revive an action for specific performance that had been barred by the statute of limitations, but specifically reaffirmed that other remedies – including rescission – are available through recoupment. 585 So. 2d at 272.

In concluding that these decisions did not apply, the court below did not rely on any rule of Florida law, but on its conclusion that 15 U.S.C. § 1635(f) extinguishes even defensive rescission three years after the transaction's closing. The District Court of Appeal also based its construction on "the law of Florida and our construction of the TILA." J.A. 143.

Whether Section 1635(f) bars rescission in recoupment turns on construction of a federal statute and congressional intent. In *Western Pacific*, this Court observed that it is "irrelevant" whether a statute of limitations is characterized as jurisdictional or not; "the question would still remain whether Congress intended it to apply to referrals as well as to affirmative suits." 352 U.S. at 73. If, as we argue above, Congress did not intend the statute to preclude defensive use of rescission three years after the transaction, there is no independent basis in Florida law for precluding rescission in recoupment in this case, just as it has been recognized as a defense in other Florida foreclosure actions.

B. Petitioners Have a Claim for Rescission in Recoupment Under Federal Law.

Federal law also recognizes the defense of recoupment for violations of federal rights, even if an affirmative claim is time barred. *Bull v. United States*, 295 U.S. at

262. Federal courts recognize recoupment even where it not specifically provided by statute. Indeed, the recoupment defense plays a significant role in federal tax and bankruptcy litigation. *See, e.g., In re University Medical Center*, 973 F.2d 1065, 1079-80 (3d Cir. 1992); *United States v. Dewey Freight System, Inc.*, 31 F.3d 620, 623 (10th Cir. 1994).

Recoupment is no less necessary for violations of the Truth in Lending Act to protect federal rights protected by the Act. Lenders who initiate foreclosure proceedings should not be permitted to avoid defenses showing that the lender violated federal law in making the loan. To exclude consideration of the lender's wrongdoing in the transaction by disregarding the breach of the federal statute unfairly prejudices consumers' federally protected rights.

Moreover, there is no valid, neutral state ground for not permitting rescission in recoupment based on the violation of federal rights. Local forms of practice are not permitted to frustrate federal rights. *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949). Here, state law explicitly permits rescission in recoupment. And, the state court has never found that a state limitations statute, whether characterized as a statute of limitations or repose, bars a recoupment defense. In the absence of any substantial state rule to the contrary, the recoupment defense is available to Petitioners as a matter of federal law, to protect the federal rights secured by the Truth in Lending Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court of Florida, and remand for further proceedings in accordance with federal and Florida law.

Respectfully submitted,

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APPENDIX

Title 15 U.S.C. § 1635 (Right of rescission as to certain transactions) provides:

(a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and

any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) Rebuttable presumption of delivery of required disclosures

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) Modification and waiver of rights

The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) Exempted transactions; reapplication of provisions

This section does not apply to –

(1) a residential mortgage transaction as defined in section 1602(w) of this title;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required

under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

(g) Additional relief

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

(h) Limitation on rescission

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

(i) Rescission rights in foreclosure

(1) In general

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if –

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) Tolerance for disclosures

Notwithstanding section 1605(f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if

the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

(3) Right of recoupment under State law

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

(4) Applicability

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

Title 15 U.S.C. § 1640 (Civil liability) provides:

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –

(1) any actual damage sustained by such person as a result of the failure;

(2)(A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than

$100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this

title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635, section 1637(a), or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.

(b) Correction of errors

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) Unintentional violations; bona fide errors

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

(d) Liability in transaction or lease involving multiple obligors

When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639 of this title may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 1607 of this title and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may –

(1) intervene in the action;

(2) upon intervening –

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

(f) Good faith compliance with rule, regulation, or interpretation of Board or with interpretation or approval of duly authorized official or employee of Federal Reserve System

No provision of this section, section 1607(b), section 1607(c), section 1607(e), or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) Recovery for multiple failures to disclose

The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer

lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

(h) Offset from amount owed to creditor or assignee; rights of defaulting consumer

A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this subchapter.

(i) Class action moratorium

(1) In general

During the period beginning on May 18, 1995, and ending on October 1, 1995, no court may enter any order certifying any class in any action under this subchapter –

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a

refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor –

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 1638 of this title;

(ii) to properly make any other disclosure required under section 1638 of this title as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 1635(a) of this title due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Board or from among forms based on such model forms.

(2) Exceptions for certain alleged violations

Paragraph (1) shall not apply with respect to any action –

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 1606(c) of this title; or

(B) described in paragraph (1)(B)(iii), if –

(i) no notice relating to rescission rights under section 1635(a) of this title was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

Title 12 C.F.R. § 226.23 (Right of rescission), provides:

(a) Consumer's right to rescind.

(1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section. [FN47]

[FN47] For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or

delivery of all material disclosures, [FN48] whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the act.

[FN48] The term "material disclosures" means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and the disclosures and limitations referred to in § 226.32(c) and (d).

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

* * *

(f) Exempt transactions. The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. The right of rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation.

(3) A transaction in which a state agency is a creditor.

(4) An advance, other than an initial advance, in a series of advances or in a series of single-payment obligations that is treated as a single transaction under § 226.17(c)(6), if the notice required by paragraph (b) of this section and all material disclosures have been given to the consumer.

(5) A renewal of optional insurance premiums that is not considered a refinancing under § 226.20(a)(5).

(g) Tolerances for accuracy. –

(1) One-half of 1 percent tolerance. Except as provided in paragraphs (g)(2) and (h)(2) of this section, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.

(2) One percent tolerance. In a refinancing of a residential mortgage transaction with a new creditor (other than a transaction covered by § 226.32), if there is no new advance and no consolidation of existing loans, the finance charge and other disclosures affected by the finance charge (such as the amount financed

and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) is greater than the amount required to be disclosed.

(h) Special rules for foreclosures. –

(1) Right to rescind. After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the consumer shall have the right to rescind the transaction if:

(i) A mortgage broker fee that should have been included in the finance charge was not included; or

(ii) The creditor did not provide the properly completed appropriate model form in Appendix H of this part, or a substantially similar notice of rescission.

(2) Tolerance for disclosures. After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) is understated by no more than $35; or

(ii) is greater than the amount required to be disclosed.

Supreme Court, U.S.
FILED
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(8)

No. 97-5310

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID R. BEACH and LINDA M. BEACH,
Petitioners,
v.
OCWEN FEDERAL BANK,
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

May an action for the statutory right of rescission provided by the Federal Truth in Lending Act, 15 U.S.C. Section 1635, be revived as a defense in recoupment beyond the 3-year limit on the right of rescission set forth in Section 1635(f)?

PARTIES

In addition to the parties listed in the caption, Great Western Bank, f/k/a Great Western Savings, was a party to the proceedings in the Florida state courts.

LIST PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

> Ocwen Financial Corporation is the parent of respondent and all of respondent's subsidiaries are wholly owned.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-5310

DAVID R. BEACH and LINDA M. BEACH,
Petitioners,

v.

OCWEN FEDERAL BANK,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR RESPONDENT

INTRODUCTION

The Court in this case took the unusual step of crafting its own question to be addressed by the parties in review of the decision of the Florida Supreme Court holding that petitioners' assertion of a federal right of rescission as a defense in recoupment to respondent's foreclosure action was barred by 15 U.S.C. § 1635(f) of the Truth in Lending Act ("TILA"). The Court's question focuses on whether the three-year expiration period for asserting a federal right of rescission can be extended indefinitely so long as the borrower's claim is raised solely in defense to a foreclosure action brought by the lender.

Petitioners and their *amici* do not argue that the statute provides an express federal right of rescission in recoupment. Nor could they because the statute's express remedy is for damages for statutory violations and the statute expressly provides recoupment defenses in fore-

closure actions only for claims for actual or statutory damages. Nor have petitioners ever asserted that they have a right of rescission under state law. Thus, petitioners' claim ultimately reduces to the following counter-intuitive proposition: even though Congress stated categorically that the right petitioners seek to assert expires after three years, there remains a federal common law basis for reviving that right. This proposition does violence to the statutory language of Section 1635(f), the structure of TILA, this Court's decisions restricting the availability of federal common law rules of decision to supplement Congressional regulation, and the manifest common sense policies that plainly animated Congress to restrict the availability of rescission for violations of TILA to a period not to exceed three years. Accordingly, the decision of the Florida Supreme Court dismissing petitioners' federal rescission claim should be affirmed.

STATEMENT

1. Regulatory Background.

The Truth in Lending Act was enacted in 1968 with a stated purpose to ensure that borrowers receive "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." 15 U.S.C. § 1601(a). To this end the statute and regulations adopted by the Board of Governors of the Federal Reserve System pursuant to delegated authority impose extensive disclosure obligations on the lender prior to the time a loan transaction is consummated. 15 U.S.C. §§ 1631, 1632, 1638; 12 C.F.R. Part 226. See Brief *Amici Curiae* of Federal Home Loan Mortgage Corporation, *et al.* ("Freddie Mac Br."), in support of Respondent at 7-8 (describing the detail and complexity of the disclosure requirements imposed upon lenders).

Recognizing that lending transactions have traditionally been regulated by state law, however, Congress was careful not to intrude too deeply into the contractual relationships between borrowers and lenders. Accordingly, Congress expressly declared that, unless provided in one of three specified sections,[1] "this subchapter and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State . . . law." 15 U.S.C. § 1610(d). Thus, the appropriate remedies for violations of TILA are provided for fully in the statute and violations of state law must serve as the basis for any additional relief.

There are two relevant remedial provisions in TILA: 15 U.S.C. §§ 1635 and 1640. The former provides, as its heading states, for a "right of rescission as to certain transactions" and the latter provides, *inter alia,* a private right of action to seek actual and statutory damages against lenders for violations of TILA. The structure of these two provisions is significantly different.

Section 1635, by its terms, does not apply to mortgage transactions involving the acquisition or initial construction of a consumer's dwelling. 15 U.S.C. §§ 1602(w), 1635(e)(1). It does apply to refinancings and home equity lines of credit. The primary protection afforded by this Section is the absolute right within three business days to rescind the transaction for any reason. This eliminates the security interest held by the lender. The lender also must return promptly any money or property given as earnest money or a down payment. 15 U.S.C. § 1635(b). Because the right to rescind may be ineffective if the borrower does not receive the disclosures mandated by TILA, the rescission remedy remains available until three days after "delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter. . . ." 15 U.S.C. § 1635(a). Thus, a material misstatement in the disclosure document, even if

[1] The provisions are Sections 125, 130 and 166, which are found at 15 U.S.C. §§ 1635, 1640, and 1666e, respectively.

largely technical, extends the borrower's unusual authority to rescind the transaction. This extraordinary right of rescission, however, "shall expire three years after the date of consummation of the transaction. . . ." 15 U.S.C. § 1635(f). After that, borrowers retain whatever rescission rights they have under state law. 15 U.S.C. § 1635 (i)(3).

Section 1640 provides an express private right of action to persons for TILA violations. The provision contains conventional language creating a one-year statute of limitations, but expressly permits a borrower to assert rights under § 1640 "as a matter of defense by recoupment or set-off" after the statute of limitation has run if the claim asserted is in answer to any action to collect a debt. Under this provision, the lender who violates TILA is liable to an individual plaintiff who obtained an installment mortgage loan for "any actual damage sustained" and for statutory damages measured as twice the amount of any "finance charge in connection with the transaction" presently with a minimum of $200 and a maximum of $2,000. Petitioners sought relief under both Sections 1635 and 1640 in this case and they received actual and statutory damages under the latter provision in recoupment, but the courts below rejected the assertion of a federal right to rescind, holding that this right had expired.

2. Facts of the Case.

The borrowers in this case, petitioners David and Linda Beach, entered into an agreement with Great Western Bank [2] on August 15, 1986, under which petitioners refinanced their house. Petitioners were loaned $97,300 to be repaid over 30 years at an adjustable rate of interest. The loan was secured by petitioners' house. J.A. 49. On November 1, 1991, more than five years after the initial

[2] Great Western assigned petitioners' mortgage loan to respondent Ocwen Federal Bank after the case was briefed and argued before the Florida Supreme Court. Ocwen was then substituted as the real party in interest in this litigation.

agreement was entered into, petitioners stopped repaying their loan. J.A. 49-50. In June 1992, Great Western filed suit in Florida's Circuit Court of the Fifteenth Judicial Circuit seeking to foreclose the mortgage on petitioners' property. J.A. 27.

Petitioners did not deny they defaulted on the loan. Instead, they asserted that violations of TILA at the 1986 loan closing justified rescinding the mortgage agreement. In seeking rescission, petitioners relied solely upon 15 U.S.C. § 1635 and 12 C.F.R. § 226.23.

After a bench trial, the circuit court found that Great Western had miscalculated and thus incorrectly disclosed to petitioners the payment schedule for the last 29 years of petitioners' loan, as well as the finance charge, in violation of TILA and the Federal Reserve Board's Regulation Z. Specifically, the court found Great Western erred by disclosing the final 348 monthly payments in an amount that was **58 cents** too much per month. This error aggregated over the entire period of the loan amounted to $201.84, which is equivalent to an error in the annual percentage rate of 0.0345%. J.A. 62.[3] The circuit court also found that Great Western had erred by excluding a $194.60 state "intangible [property] tax" payment from the total finance charge disclosed. J.A. 68-70. Consequently, Great Western notified petitioners they should expect to pay $176,519.21 in finance charges, which was $7.24 more than the correct amount of $176,511.97.

The trial court concluded that petitioners were entitled to recoup or set-off actual damages in the amount of $396 against the amount owing on the mortgage. J.A. 79. The court allowed recoupment or set-off of statutory damages in the amount of $1,000, as well as attorneys fees. J.A. 75-76, 80. The circuit court, however, denied petitioners'

[3] Because the mortgage contained a variable rate, which resulted in annual adjustments of the installment payment, petitioners in fact never actually paid the incorrect amount that Great Western originally disclosed. J.A. 55, 90.

claim that they were entitled to rescind the entire transaction. J.A. 74. The court reasoned, in part, that Section 1635(f) of TILA barred petitioners' effort to rescind the agreement more than five years after its consummation. In particular, the trial court ruled that "Congress' omission in 15 U.S.C. § 1635(f) of the recoupment and set-off language contained in 15 U.S.C. § 1640(e) clearly establishes the parameters for this court concerning the continued vitality of any rescission right which may have existed, after the expiration of three years." J.A. 74.

The Fourth District Court of Appeal affirmed, but certified to the Florida Supreme Court the question whether "[u]nder Florida law, may an action for statutory right of rescission pursuant to the Truth in Lending Act, 15 U.S.C.A. Section 1635, be revived as a defense in recoupment beyond the three-year limit on the right of rescission set forth in Section 1635(f)?" The Florida Supreme Court unanimously answered the question in the negative. J.A. 157-173.

The Florida Supreme Court refused "to disregard [the] statute's plain meaning," which commands that the federal statutory right of rescission "shall expire three years after the date of consummation of the transaction . . . ." J.A. 173, 164 (quoting 15 U.S.C. § 1635(f)). Moreover, the court concluded that the equitable remedy of recoupment was inapt here because " '[t]he further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years.' " J.A. 173 (quoting *Beach* v. *Great Western Bank*, 670 So. 2d 986, 990 (Fla. Dist. Ct. App. 1996)).

SUMMARY OF ARGUMENT

A.

At bottom, the question posed by this Court in granting certiorari requires nothing more than an interpretation of language that, on its face, is utterly unambiguous—the

TILA "right of rescission shall expire three years after the date of consummation of the transaction . . . ." 15 U.S.C. 1635(f). Petitioners unquestionably seek to assert a federal statutory right of rescission, as opposed to a state common law right of rescission, more than three years after consummating the loan transaction. Accordingly, their claim is barred by the plain language of the statute. As this Court has repeatedly observed, the beginning and end of statutory interpretation is a careful parsing of the language chosen by Congress to achieve its legislative objectives. Given the clarity of Congress's language restricting the TILA right of rescission, the textual analysis, by itself, is wholly sufficient to decide this case in favor of respondent.

B.

The conclusion that the statutory right of rescission does not survive its express three-year expiration period, regardless of whether it is asserted affirmatively or by way of defense, is reinforced by the structure of TILA. First, it is manifest that Congress's choice of the concept of a "right" which "expires" is not accidental. A comparison between the language of Section 1635(f) and 15 U.S.C. § 1640(e) demonstrates that Congress did not mean for the three-year period to be an ordinary statute of limitation. Section 1640(e) states that an action for damages under TILA "may be brought . . . within one year from the date of the occurrence of the violation." This, of course, is the classic language of limitation. Congress's failure to use similar phrasing in Section 1635(f) plainly indicates that the "expiration" language was meant to provide a more definite period of termination than would arise under an ordinary statute of limitation.

C.

Although the "expiration" language, both alone and in context, plainly compels the conclusion that TILA's right

of rescission is extinguished for all purposes three years after the transaction being challenged, Congress further reinforced its intention to bar petitioners' use of rescission as a defense when it expressly dealt with the issue of recoupment in two additional provisions of TILA. In both instances Congress's express treatment of recoupment is inconsistent with petitioners' assertion of a federal right of rescission in this case.

First, in Section 1640(e) Congress granted persons in petitioners' situation a right to assert a claim for damages under Section 1640(a) "as a matter of defense by recoupment or set-off" in a suit brought by the lender to recover on a debt even after the one-year statute of limitation for bringing a damages action has run. The express grant of a statutory right of recoupment that does not apply to actions to rescind provided under Section 1635 plainly indicates that Congress did not intend to confer any right of rescission upon petitioners that survived the three-year expiration period.

Second, Congress recognized that there might be a "right of rescission in recoupment under State law." 15 U.S.C. 1635(i)(3). Accordingly, Congress expressly provided that such a state right of rescission remained unaffected by the statute. Again, the inference is unmistakable that Congress did not overlook the possibility that the federal right of rescission might be asserted in recoupment. Instead, Congress chose not to confer any such right under TILA. What Congress did provide was assurance that the safety net of *state law* rescission would remain available in recoupment to borrowers who could prove that they are entitled to the extraordinary relief of rescission, generally by demonstrating actual fraud, duress or coercion. No such claim has been made here.

D.

Given the manifest absence of any federal statutory basis for providing petitioners with a TILA right of rescission in recoupment, they ultimately must find a federal common law basis for the right they seek to assert in this Court. But this Court has repeatedly held that "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981).

Nor is there any support for petitioners' position in the general common law of equitable recoupment. The essence of that doctrine is that it is inequitable to allow an ordinary statute of limitations designed to prevent "stale" claims to preclude the defensive assertion of a claim arising out of the same "stale" transaction if the plaintiff asserts a timely claim that puts the matter before the court. In contrast, the purpose of § 1635(f) is to extinguish the TILA rescission right after three years and thus requires that the limit be applied regardless of whether the rescission right is asserted defensively or affirmatively.

Moreover, neither *Bull* v. *United States*, 295 U.S. 247 (1935); *United States* v. *Western Pac. R.R.*, 352 U.S. 59 (1956); nor *Reiter* v. *Cooper*, 507 U.S. 258 (1993), provides any basis for recognizing a right of rescission in recoupment where the asserted right is utterly unsupported by any reasonable notion of fairness or equity and where Congress plainly has indicated an intent not to authorize a federal right of rescission in recoupment. Congress's actions in enacting and amending TILA over the past 30 years bring this case within the rule of *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952), where the Court refused to apply recoupment at all because the remedy was inconsistent with Congress's manifest intent in enacting the statute at issue there.

E.

Finally, Congress's choice, in response to pointed requests by the Federal Reserve Board and the National Commission on Consumer Finance to impose a three-year deadline on the federal right of rescission, reflects a careful balance of the need to provide significant short-term protections to borrowers without imposing unjust penalties upon lenders and their assignees and to cabin the federal rescission right in a manner designed to promote an efficient secondary mortgage market. Judicial creation of a federal rescission right in recoupment after the three-year period has expired would undermine Congress's carefully balanced remedial scheme and do long-range harm to the interests of borrowers and lenders alike.

ARGUMENT

CONGRESS IN 15 U.S.C. § 1635(f) CATEGORICALLY RESTRICTED THE FEDERAL RIGHT OF RESCISSION UNDER TILA TO THREE YEARS AND THERE IS NO BASIS IN STATUTORY OR COMMON LAW TO REVIVE THAT RIGHT AS A DEFENSE IN RECOUPMENT.

In enacting TILA Congress conferred upon certain borrowers an extraordinary power to rescind certain loan agreements if the lender failed to comply with the material disclosure requirements of TILA, many of which are highly technical. The primary objective of 15 U.S.C. § 1635's federal right of rescission is to provide a relatively brief "cooling off" period for loans in which the borrower has granted a security interest on his or her house as part of the deal. See *Davis* v. *FDIC*, 620 F.2d 489, 491 (5th Cir. 1980). The right of rescission ensures that a borrower does not suffer permanently if he or she is stricken with "buyer's remorse" after reflecting for a couple of days upon the merits of entering into a particular loan agreement.

This commonly used tool for protecting consumers[4] carries a particularly powerful consequence if the lender fails to comply fully with the material disclosure obligations under TILA. As originally enacted in 1968, the borrower had a temporally unrestricted right to seek rescission. Thus, even on the 365th day of the last year of a mortgage, a borrower theoretically could assert a right to rescind and obtain all amounts paid in interest and other charges and eliminate the security interest the lender held on the borrower's house.

This unrestricted federal right of rescission necessarily placed a cloud on title and the enforceability of liens. These adverse consequences caused the Federal Reserve Board and the National Commission on Consumer Finance to recommend Congress enact an express three-year expiration period on the federal right of rescission. See Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1971* 19 (Jan. 3, 1972); National Commission on Consumer Finance, *Consumer Credit in the United States* 190 (Dec. 1972). Congress followed the suggestion of the Board and the Commission and subsequently amended § 1635 to add a subsection (f) that provides the federal right of rescission "shall expire" three years after the consummation of the transaction under consideration.

In effect, the three-day cooling-off period is extended until accurate disclosures are provided to the borrower,

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[4] The three-day cooling off period in TILA has counterparts in many other consumer protection laws. For example, the Federal Trade Commission has promulgated a trade regulation that ensures consumers receive a three-day cooling off period in connection with sales made at the consumer's home. *See* 16 C.F.R. Part 429. Likewise, virtually all states have adopted three-day cooling off statutes that apply to home sales of consumer products. *See generally* Home Solicitation Sales, 1 Consumer Credit Guide (CCH) ¶ 525 (July 16, 1996) (compiling state statutes). The common purpose of these consumer protection statutes is that they are intended to allow consumers to make informed decisions after having an opportunity to reflect on appropriate considerations.

but not longer than three years after the transaction is consummated. After three years, under the plain language of 15 U.S.C. § 1635(f), the federal right of rescission "shall expire." See *King* v. *California*, 784 F.2d 910 (9th Cir. 1986) (three year period not extended by equitable tolling). The question is whether there is any basis for courts to revive this remarkable right when Congress plainly intended for it to terminate automatically with the passage of three years. The answer is no.

A. The Plain Language Of § 1635(f) Categorically States That The Federal Right Of Rescission Embodied In That Provision "Shall Expire" After Three Years And Thus Petitioners' Claim Is Barred By That Provision.

As this Court repeatedly has recognized in recent years, the starting point and often the ending point of statutory interpretation is the language Congress has used to express its intent. See, *e.g.*, *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'") (quoting *Chevron, U.S.A. Inc.* v. *Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). It is difficult to imagine how Congress could have been more clear in expressing its intention than by declaring that "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction. . . ." 15 U.S.C. § 1635(f). By doing so, Congress did not enact an ordinary statute of limitation. To the contrary, the common understanding of "shall expire" is sweeping and definitive. Expire means "become void through the passage of time." Webster's Third New International Dictionary 801 (1971). See Black's Law Dictionary 579 (6th ed. 1990) ("expiration" means "termination from mere lapse of time"). The use of the mandatory term "shall" reinforces further the clear message that this is not a provision designed to confer any discretion on the courts to decide how to enforce the absolute time bar on asserting the federal right of rescission embodied in § 1635(f).

The categorical nature of the expiration period is reinforced by the other elements of § 1635. Congress added the three-year expiration period on top of a three-day cooling off period. This Court previously has recognized that the addition by Congress of a secondary deadline generally compels the conclusion that it is "an outside limit" that admits of no implied exceptions. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991) (second deadline "can have no significance in this context other than to impose an outside limit") (internal quotation marks omitted).

The rationale for implying an exception for recoupment either as a matter of statutory construction or under a federal common law theory is further undermined by Congress's inclusion of a single express exception to the three-year expiration period. Congress specifically extended the expiration period in the narrow situation where: 1) an agency empowered to enforce TILA "institutes a proceeding to enforce the provisions of this section within three years after" the transaction is consummated; 2) the agency finds that the lender has violated § 1635; and 3) the rescission claim arises out of the violation found by the agency. 15 U.S.C. § 1635(f). The presence of an express exception to the otherwise facially absolute bar to asserting rescission after three years leaves no room for courts further to supplement § 1635 by adding an exception for recoupment. See *United States* v. *Dalm*, 494 U.S. 596, 610 (1990) (statutorily specified exceptions should not be expanded through equitable recoupment).

What makes Congress's inclusion in 1980 of this extremely limited administrative exception to the expiration period in § 1635(f) particularly telling is that at that same time Congress was adding its express recoupment and set-off exception to the statute of limitations in § 1640. Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, §§ 612(a)(6), 615(a)(4), 94 Stat. 132, 176, 181 (1980). See p. 4, *supra*. Had

Congress intended to provide a similar exception to the three-year expiration period, it would have done so expressly. Its decision to leave the expiration period absolute provides additional evidence that Congress simply did not intend to permit borrowers to assert a federal rescission claim after three years, whether brought affirmatively or as a defense to a foreclosure action.

One last piece of evidence that § 1635 means what it says is the Federal Reserve Board's regulation implementing § 1635. The rule is not particularly illuminating, but it does support respondent's interpretation. The regulation provides, in pertinent part:

> the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first.

12 C.F.R. § 226.23(a)(3) (footnote omitted). Similarly, the Official Staff Commentary on the regulation states that "the right to rescind automatically lapses" no later than three years after consummation of the transaction. 12 C.F.R. Part 226, Supp. I, para. 23(a)(3)-3.[5]

Obviously, the regulation and commentary largely parrot the statutory language. Nevertheless, the regulation admits no additional exceptions and thus facially confirms that the expiration period cannot be extended for any reason other than the pendency of an enforcement

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[5] The commentary provides in relevant part that

> [w]hen the creditor has failed to take the action necessary to start the three-business day rescission period running, the right to rescind automatically lapses on the occurrence of the earliest of the following three events: [1] The expiration of three years after consummation of the transaction[;] [2] Transfer of all the consumer's interest in the property [; or] [3] Sale of the consumer's interest in the property . . . .

12 C.F.R. Part 226, Supp. I, para. 23(a)(3)-3.

action by an administrative agency enforcing TILA. See 12 C.F.R. § 226.23(a)(3) (only "[i]n the case of certain administrative proceedings" is the period *"extended"*) (emphasis added).

In sum, the Court need look no further than § 1635(f) to answer the question it propounded. Congress created a federal right of rescission and imposed an "outside limit" during which the remedy is available, whether it is asserted affirmatively or not. The federal right of rescission, which is extremely favorable to borrowers, is restricted by an absolute three-year expiration period. Fidelity to Congress's manifest intent, as embodied in the directly relevant language, requires rejection of petitioners' attempt to revive their federal right of recission five years after the transaction being challenged has been consummated.

B. The Structure Of TILA's Remedial Provisions Demonstates That Congress Did Not Intend To Extend The Federal Right Of Rescission By Way Of Recoupment.

Although any fair reading of § 1635(f) compels the conclusion that the federal rescission right is strictly cabined by a three-year expiration period, the Court has indicated that statutory construction is a "holistic endeavor." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Accordingly, the Court routinely examines the relationship between the directly relevant text and the broader context provided by related provisions in the statute and relevant decisional law. In this case those sources merely reinforce the plain intent that assertions of a federal right of rescission will not be heard more than three years after the loan is consummated.

The contrast between § 1635 and § 1640 of TILA concerning the treatment of the limitations periods and the availability of recoupment reveals plainly that Con-

gress understood the role of recoupment in reviving claims barred by an ordinary statute of limitations and that Congress intended not to permit the expiration period in § 1635(f) to be extended by reliance upon recoupment. First, the language imposing a deadline for bringing a private damages action under § 1640 is that traditionally used in literally hundreds of statutes of limitation enacted by Congress. "Any action . . . may be brought . . . within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). This empowering language stands in striking contrast to the rights restricting language quoted above concerning the expiration period for asserting a federal right of rescission. This difference alone suggests that Congress intended the language in § 1635(f) to have a much stricter interpretation than is generally applied to mere statutes of limitation.

But Congress went even further in § 1640(e) and expressly recognized and addressed the issue of the effect of the limitation period on the assertion of a "defense by recoupment or set-off" against an action by the lender to collect the underlying debt from the borrower. There, in sharp contrast to the treatment of the three-year expiration period in § 1635(f), Congress declared that the one-year limitation period was not a bar to "recoupment or set-off." Thus, as happened in this case, the borrower is permitted to assert actual and statutory damages to reduce the overall debt owed to the lender. The absence of any language in § 1635 that grants the right of recoupment or set-off after the three-year period for rescission has expired strongly evidences Congress's intent not to authorize the courts to formulate a rescission right that can be asserted after the statutory period has expired. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally

and purposely in the disparate inclusion or exclusion") (internal quotation marks omitted).[6]

That Congress did not intend the courts to go beyond their statutorily conferred powers in devising remedies for violations of TILA is made plain by 15 U.S.C. § 1610(d). There, Congress declared in relevant part that, except as provided explicitly in §§ 1635 and 1640, "the validity or enforceability of any contract" is unaffected by TILA and its regulations. Congress thus narrowed the available remedies for the enforcement of violations of TILA to those provided in the specific enforcement provisions of the Act. If respondent is correct that §§ 1635 and 1640 do not authorize rescission as a matter of federal law after the three-year period has expired, then § 1610(d) must prevent the courts from looking beyond those provisions to find a rescission remedy for a TILA violation that will interfere with the ordinary enforcement of the loan agreement.

C. Congress Relied Upon State Law To Provide Any Right Of Rescission After The Three-Year Period For Asserting A Federal Right Of Rescission Has Expired.

Petitioners and their *amici* make the essentially nonstatutory argument that rescission should be available because it will protect borrowers from unscrupulous lenders and will ensure that lenders comply steadfastly with their obligations under TILA. By interpreting § 1635(f) ac-

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[6] Petitioners assert in passing (Br. 22-23) that their interpretation of TILA as permitting a federal right of rescission in recoupment is supported by § 1640(e), which expressly preserves an otherwise barred claim for damages to be asserted as a set-off or in recoupment. That provision, however, cannot be stretched, as petitioners suggest, to provide explicit statutory support for extending the period that "shall expire" after three years under § 1635(f). Section 1640(e)'s direct reference to "one year from the date of the occurrence of the [TILA] violation" plainly shows the subsection is aimed exclusively at claims for damages under TILA that are governed exclusively by § 1640.

cording to its plain meaning, however, the Court will not render borrowers powerless to protect themselves against predatory lenders. Congress provided a safety net in § 1635(i)(3), by making clear that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." Thus, Congress was explicit that, even though it temporally restricted the federal right of rescission, it in no way meant to pre-empt the borrower's state law rescission rights if available in recoupment. Thus, although lenders are protected by § 1635(f) from the extraordinary federal rescission remedy in TILA after three years, TILA does not provide any protection from an asserted defense of rescission provided by state law for fraud or other misconduct. See 1 Jay M. Lee, *Black's Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 14 at 21 (2d ed. 1929) (identifying the general rule that "a contract properly entered into by competent parties . . . can[] be rescinded . . . [if] he is able to show the existence of some well-recognized title to equitable relief, such as fraud, mistake, or duress").

Congress's reference to state rescission rights in recoupment strongly reinforces the conclusion that § 1635(f) should be read as providing an absolute bar to the assertion of a federal right to rescission after the three-year period has expired. Clearly, Congress was not oblivious to the interrelationships between legal and equitable remedies under TILA or to the interplay between federal and state law. Indeed, Congress acted with striking clarity in placing the federal rescission right precisely into the broader mix of state and federal protections for borrowers.

Petitioners' argument that Congress's addition in 1995 of § 1635(i)(3) supports their position is seriously flawed. Section 1635(i)(3) is merely a savings clause that, by its terms, is limited to the effect of "this subsection." The operative provisions of the rescission rights granted by that "subsection," which are found in clauses (1) and (2), are expressly subject to the three-year time

limit in § 1635(f). Congress's express incorporation of the three-year limit simply cannot be reconciled with any reading of § 1635(i)(3) that expands the rescission right beyond the absolute expiration date mandated by that provision.

Second, if Congress intended to permit a federal right of rescission in recoupment without regard to the three-year expiration period, then there would be no reason to preserve a state law right of rescission in recoupment. It is only by assuming that Congress intended categorically to restrict the federal rescission right that it makes sense for Congress to be concerned that an argument could be made that any state law right of rescission in recoupment might be pre-empted.

Third, petitioners' analysis of § 1635(i)(3) improperly conflates the analysis of the relevant state and federal remedies. Petitioners cannot mix and match their federal and state law remedies without doing violence to both federal and state law. They clearly had a federal right of rescission, but that right expired by its own terms. There is no express provision for a federal right of rescission to be asserted in recoupment and Congress declared in 15 U.S.C. § 1610(d) that its carefully crafted remedial scheme should not be supplemented. Petitioners received damages by way of recoupment or set-off as Congress clearly provided in § 1640. There may be a state right of rescission that might be asserted in recoupment, but that right plainly would require a showing of fraud, duress, or coercion to support rescission. No such claim has been alleged much less proven.

What petitioners appear to want is the federal right of rescission, which merely requires proof of certain types of TILA violations, coupled with the state right of recoupment, which presumably is not restricted by a three-year expiration period. The problem with such an analysis is that it conflicts with Congress's express intent in both § 1635(f) and § 1635(i) to restrict temporally the federal right of rescission to three years and it expands signifi-

cantly state law by permitting rescission in circumstances where Florida does not otherwise authorize the extraordinary use of this equitable remedy. There is no justification in law or logic for such an outcome so wholly at odds with both legal systems. Indeed, this Court has recognized expressly that state law exceptions should not be applied to federal limitations statutes because such an unintended mixture of federal and state law would be inconsistent with federal policies of establishing uniform national limitations on federal statutes. See *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 433 (1965).[7]

Finally, where, as here, Congress's intent is reflected unambiguously in the language and structure of the statute, resort to legislative history is unnecessary. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Nevertheless, what little relevant history there is certainly casts no doubt on the correctness of respondent's interpretation of §§ 1635(f) and 1640. First, the inclusion of a three-year expiration period was urged by the Federal Reserve Board to eliminate clouds on title, which arise out of the uncertainty of a temporally unrestricted right of rescission for mere technical violations of TILA. Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for 1972* 15-16 & App. D at 2 (Jan. 3, 1973). This same uncertainty also creates obstacles to assigning mortgages. Congress enacted the amendment in 1974 without any direct discussion. H.R. Conf. Rep. No. 93-1429, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6148, 6152 (describing the amendment as merely part of miscellaneous changes).

When Congress amended TILA in 1995, it added subsection (i), which provided special new rescission rules

[7] Even if Congress intended to allow state recoupment law to apply to the assertion of federal statutory rescission rights, the result would be the same in this case because the Florida Supreme Court held that Florida recoupment law could not be used to assert the TILA rescission claim after three years.

for foreclosure actions and preserved any state law right of rescission in recoupment from implied pre-emption under TILA. Truth in Lending Amendments of 1995, Pub. L. No. 104-29, §§ 5, 8, 109 Stat. 271, 275-76 (1995). The floor managers in urging these changes were emphatic that the effect of the 1995 amendments would not modify the requirement that a right to rescission still must be exercised within three years of the loan closing or be barred forever. 141 Cong. Rec. S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); 141 Cong. Rec. H9514-9516 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum). These discussions concededly are, at best, of only marginal help in interpreting 1635(f), but they do confirm the interpretation compelled by the language of the statute and reflect that nothing in the 1995 amendments altered the absolute three-year expiration period.

Finally, petitioners and their *amici* argue at length that the failure to enact bills proposed in 1995 that would have terminated all rights of rescission after three years somehow supports their argument that the expiration period in § 1635(f) does not bar a federal claim for rescission in recoupment. In fact, what that history reveals is that Congress was unwilling to pre-empt state law rights of rescission in recoupment. All of the previous bills provided for pre-emption and the final legislation as enacted preserved state law as a safety net while maintaining the absolute three-year expiration period for assertions of a federal right of rescission. Far from supporting petitioners' interpretation, this legislative history demonstrates that Congress was unusually careful in crafting its remedial scheme and that scheme does not leave room for a judicially-created federal right of rescission in recoupment, which is what petitioners propose.

At the end of the day, Congress created an extraordinary federal right of rescission that contained an unambiguous expiration date. Congress also authorized more conventional remedies under federal law and made them

subject to an ordinary statute of limitations. Congress went further and ensured that any right to damages could be asserted defensively as a matter of federal law in recoupment or set-off, even after the statute of limitation has expired. Congress also declared that nothing in this scheme would pre-empt any state law claim of rescission in recoupment that a borrower might assert. It is simply fanciful to suggest that Congress in carefully enacting this scheme meant to impose an absolute three-year restriction on the federal right of rescission that can be completely undone simply by having the borrower stop making payments on his or her loan and then seeking to obtain a federal right of rescission in recoupment that is nowhere provided for in TILA.

D. Under This Court's Decisions, Congress's Statutory Scheme in TILA Eliminates Any Basis For Creation By Courts Of A Federal Defense Of Rescission By Way Of Recoupment.

Notwithstanding the clarity with which Congress has spoken in restricting the time for asserting a federal rescission claim, petitioners and their *amici* urge the Court to imply a federal right to proceed after the three years have expired by way of recoupment as a defense to petitioner's foreclosure action. The source of law for the TILA rescission claim in recoupment is not plainly stated by petitioners. Pet. Br. 15 (" 'Recoupment' is a widely recognized common law defense"). They make no effort to argue that it has an explicit federal statutory basis and they have never asserted a state law right of rescission that would be enforceable by way of recoupment or otherwise. Thus, it would appear that this rescission in recoupment must exist, if at all, as a matter of federal common law.

Simply because this Court in other contexts has found a federal common law basis for recoupment does not, however, lead inexorably to the conclusion that there is a federal common law right of rescission in recoupment that applies in the Truth in Lending Act context. This

Court has recognized since *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938), that "[t]here is no federal general common law." See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 83 (1994). Thus, the Court cannot merely assume that the right asserted by petitioners in fact is available here. See *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952) (rejecting recoupment in Shipping Commission Act cases).[8]

1. *There is no basis for supplementing Congress's carefully reticulated remedial scheme by providing a judicially created federal common law remedy in recoupment.*

It cannot be gainsaid that Congress has entered the field governing the relationship between borrowers and lenders concerning the consequences of the lender's failure to provide certain information in connection with a par-

[8] Even if the Court undertook to create a federal common law rule to supplement the remedies Congress has provided in TILA, it is hardly obvious the Court would adopt "rescission in recoupment." Traditionally, recoupment has been associated almost exclusively with a damages remedy and rescission is a distinctly separate equitable remedy. Indeed, Congress seems to have recognized this distinction in §§ 1635 (rescission) and 1640 (recoupment of damages). Plaintiffs in state courts thus typically are required to elect between the two remedies. *See, e.g., Thompson* v. *Rhodehamel*, 127 P. 572, 573 (Wash. 1912) (litigant must elect between recoupment and rescission); *Loma Vista Dev. Co.* v. *Johnson*, 180 S.W.2d 922, 924 (Tex. 1944) (identifying rescission and damages in recoupment as distinct remedies); *Dunlap* v. *Peirce*, 168 N.E. 277, 280 (Ill. 1929) (rescission and damages in recoupment are distinct remedies); *Morris Plan Leasing Co.* v. *Bingham Feed & Grain Co.*, 143 N.W.2d 404, 413 (Iowa 1966); *Cockrum* v. *Pattillo*, 439 S.W.2d 632, 643 (Ark. 1969) (election of remedies between rescission and recoupment required). *But see Ed Miller & Sons, Inc.* v. *Earl*, 502 N.W.2d 444, 453 (Neb. 1993) (rejecting election of remedies between recoupment and rescission, but still discussing recoupment in terms of damages). Because TILA clearly eliminates any basis for the Court to supply a federal common law rule (*see* pp. 23-24, *infra*), however, there is no need for this Court to attempt to resolve the proper relationship between recoupment and rescission.

ticular lending transaction, such as the one entered into by petitioners. As described by respondent previously (*supra* pp. 3-4), Congress provided an extraordinary rescission remedy with a self-contained expiration date and a significant damages remedy that is subject to traditional rules governing recoupment. Under this Court's decisions concerning federal common law, Congress's enactments have restricted the freedom of this Court to provide additional remedies beyond those contained in Congress's carefully reticulated statutory scheme.

This Court has held repeatedly that "once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, *not create common law*." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981) (emphasis added); accord, *City of Milwaukee* v. *Illinois & Mich.*, 451 U.S. 304, 314 (1981). The rationale for this approach is that "[o]ur 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal"' when Congress has addressed the problem." *Id.* at 315 (quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978)). See *City of Milwaukee*, 451 U.S. at 317 & n.9 (even preexisting federal common law rules are subject to displacement by congressional entry into a particular field). Thus, where, as here, Congress has generally addressed the relevant subject matter in dispute and carefully provided a set of remedies, it simply is not permissible for the Court to employ federal common law to add to the remedies that Congress supplied by statute.

2. *This Court's prior decisions granting recoupment rights are readily distinguishable from this case.*

Petitioners primarily rely (Pet. Br. 15-18) upon three cases decided by this Court to support their argument that

a right of rescission in recoupment can be applied as a matter of federal common law in this case. They are *Bull* v. *United States*, 295 U.S. 247, 262 (1935); *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 71 (1956); and *Reiter* v. *Cooper*, 507 U.S. 258, 265 (1993). Although petitioners treat those cases as if they obviously apply to the circumstances of this case, this effort to gloss over the general policy underlying recoupment, as well as the facts and holdings of those cases, reveals plainly the lack of support those decisions offer petitioners.

First, the general equitable underpinnings of the doctrine of recoupment relate to ordinary statutes of limitation and not § 1635(f). An ordinary statute of limitation is designed to prevent litigation of "stale claims." *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 554 (1974). If a plaintiff brings a timely claim, the doctrine of recoupment recognizes it would be inequitable for a party to be limited by an ordinary statute of limitation from asserting defensively a claim arising out of the same "stale" transaction, since the plaintiff has placed the matter before the court. As stated in *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 72 (1956), "it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case . . . . [I]f [the] litigation is not stale, then no issue in it can be deemed stale." In contrast, the purpose of § 1635(f) is not to prevent stale claims, but to restrict temporally the extraordinary TILA rescission remedy. That congressional purpose is honored only if the three-year period is applied regardless of whether the claim is asserted defensively or affirmatively. Thus, petitioners are flatly wrong in asserting (Br. 17-18) that the purposes of § 1635(f) would not be served in the recoupment context.

Second, none of the cases cited by petitioners involved the Truth in Lending Act and this Court's decisions make plain that the availability of a federal common law rule depends upon the nature of the federal interest implicated

in each particular case. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728-729 (1979). Thus, the fact that the Court would permit a shipper to assert a federal statutory claim of rate unreasonableness in response to a demand that the shipper failed to pay the federally mandated filed rate, all of which is regulated exclusively by federal law, as in *Reiter* and *Western Pacific*, provides no guidance on what approach to take in a case, such as this one, that involves significant state law interests and conduct generally regulated at the primary level by state law. Similarly, the proper rules governing the relationship between the United States and federal taxpayers involved in *Bull* provides a much stronger argument for the Court to adopt a federal rule regulating those parties' dealings than the situation posed by the commercial relationships between an ordinary borrower and lender.

Third, the cases where the Court has imposed a federal rule of recoupment have involved strong arguments that equity compelled allowing the defendant to assert the particular claim. The Court refused in *Bull* to permit a federal taxpayer to be exposed to double taxation when the money being retained by the government in the first instance "was against morality and conscience." 295 U.S. at 260. Similarly, in *Western Pacific* and *Reiter*, the Court rejected the suggestion that a carrier could avoid having the reasonableness of its rates reviewed by waiting until the shipper's refund period had expired before attempting to collect the filed rate.

In this case, by contrast, petitioners' claim has virtually no equity and it reveals plainly why Congress wisely placed an absolute expiration date on the federal rescission right it created. First, it is obvious that petitioners were not deceived by Great Western's TILA violations. Those violations unquestionably were irrelevant to petitioners' default on the mortgage. Thus, to ignore the plain language of § 1635(f) in this context leads to a

result that is precisely the opposite of the rationale that motivated the Court to apply recoupment in *Bull*, *Reiter* and *Western Pacific*. To grant rescission in addition to the recoupment or set-off already granted pursuant to § 1640 will confer a completely unwarranted windfall upon petitioners.

Moreover, petitioners' entire argument begs the central question of statutory interpretation, *viz*, is the three-year expiration period an ordinary statute of limitation. For reasons fully discussed above (pp. 15-16 *supra*), § 1635(f) plainly is not a mere statute of limitation. It does not use the language of traditional statutes of limitation and its purpose is not to avoid litigating stale claims. Thus the rule in *Bull*, *Western Pacific* and *Reiter*, which applies only to ordinary statutes of limitation, has no application here.

Ultimately, this case is like *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952), which petitioners ignore, where this Court rejected the availability of recoupment as inconsistent with the overall purpose of the Shipping Commission Act to protect the income of sailors. *Isbrandtsen* undermines petitioners' repeated argument that Congress must act with unusual clarity to bar recoupment.[9] Under *Isbrandtsen*, recoupment should be barred whenever that is the plain intent of Congress, no matter how that intent is expressed. Here, of course, Congress has been as clear as it can be. The federal recission right expires for all purposes three years after the transaction.

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[9] Petitioners repeatedly urge the Court to adopt a "clear statement" rule in this case. The point is academic, however, because Congress has spoken clearly enough. Moreover, *Isbrandtsen* certainly casts doubt on the existence of a rule requiring "magic words" to eliminate recoupment as a defense to a particular claim.

E. Section 1635(f) Reflects Congress's Recognition That A Federal Right Of Rescission For Violations Of TILA That Lacked An Absolute Three-Year Time Limit Would Grant Unwarranted Windfalls To Borrowers, Would Impose Unjustified Penalties On Lenders And Particularly On Their Assignees And Would Severely Disrupt And Harm Secondary Mortgage Markets.

Petitioners offer three policy arguments that allegedly support their interpretation of § 1635(f) as permitting rescission to be asserted in recoupment more than three years after the transaction is consummated. Obviously, policy arguments, no matter how strong, cannot override plain statutory language and clear evidence of Congressional intent. See *United States* v. *Dalm*, 494 U.S. 596, 610 (1990) (equitable recoupment should not be used to "overrid[e] Congress' judgment as to when equity requires that there be an exception to the limitations bar."); *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 303 (1946) (equitable recoupment should not encroach on the policy of the statute). In this case, however, petitioners' policy arguments are strikingly hollow and the policies served by restricting the federal right of rescission to three years are so powerful that they reinforce the conclusion that Congress unquestionably meant what it said when it declared absolutely that the federal right "shall expire."

First, petitioners assert that the three-year period will permit lenders to undermine TILA by refusing to bring a foreclosure action until after three years. This argument overlooks § 1640. Borrowers still can and will assert TILA violations in response to foreclosure actions because of the statutory damages and attorneys' fees available under that provision. Thus, TILA will still be enforced even after the rescission period has expired.

Moreover, it is fanciful to think that rescission is necessary to provide lenders with an incentive to comply with TILA. A two-thousand dollar penalty and actual compensatory damages and attorneys' fees are significant reasons to comply with federal law, especially when a TILA violation many times affects a substantial number of loans. In addition, rescission is still available for up to three years and no reasonable lender would ignore so powerful a remedy in deciding whether to comply with TILA. Finally, if rescission were absolutely essential to the effective enforcement of TILA, Congress would not have excluded purchase money loans from the rescission right and would not have adopted an expiration period that applies only to the right of rescission.

Nor is a federal right of rescission necessary to protect borrowers from genuinely nefarious lenders. Congress's express decision not to pre-empt state rescission law protects borrowers from fraud, coercion or duress in connection with loan transactions, just as states have been protecting consumers for centuries.

On the other hand, the rescission right, if asserted in recoupment many years after the loan is consummated, grants the borrower an enormous windfall. The *amici curiae* brief of Federal Home Loan Mortgage Corporation, *et al.*, provides a relatively simple illustration of the breathtaking scope of relief available to a borrower and demonstrates plainly the excessive nature of the remedy, particularly for errors that are largely technical and unintentional as in this case.

In their example *amici* hypothesize a $100,000 loan with simple interest and no origination charges and they demonstrate that the effect of the exercise of a federal right of rescission eight years after the transaction closed would be the difference between $92,248.77, which is the outstanding loan balance that the lender reasonably should have expected to recover, and $21,951.60, which is the amount the lender theoretically will receive under petitioners' interpretation. Given the likelihood that many of the borrowers who default on their mortgages are in

bankruptcy or unable to repay their loans, the lender's realistic prospect of recovering even the full $21,951.60 of an unsecured claim is very slim. In sum, *amici*'s point is powerful. The right to rescission embodied in § 1635 is extraordinary and allowing it to survive the three-year expiration period will have significant harmful consequences both to the individual lender and for the mortgage markets more generally. See Freddie Mac Br. 15-19.

Of course, the impact of a federal rescission remedy in recoupment is particularly unfair when it is applied to an assignee and not to the original lending institution. If Congress had meant to impose such a burden on innocent assignees, it would be reasonable to expect the statute to say so expressly. Moreover, the need for a measure of certainty in the law to promote a secondary market in mortgages is completely undermined by the creation of a right to rescission that assignees cannot meaningfully evaluate prior to accepting a mortgage. Only one certain result flows from the federal right of rescission in recoupment asserted by petitioners: the cost of borrowing will increase for all consumers. See Freddie Mac Br. 16-17.

To be sure, Congress could enact legislation that would do so little to promote the objectives of TILA and so much to harm borrowers and the mortgage markets, but the language Congress inserted into § 1635(f), which temporally restricts the federal rescission right, plainly was not such legislation. In sum, the Court should reject petitioners' invitation to judicially rewrite the statute and upset the balance of interests Congress struck in the remedial provisions of the Truth in Lending Act.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

v.

OCWEN FEDERAL BANK,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Florida

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INTRODUCTION

The question presented, as framed by the Court, is:

> May an action for the statutory right of rescission provided by the Federal Truth in Lending Act, 15 U.S.C. Section 1635, be revived as a defense in recoupment beyond the 3-year limit on the right of rescission set forth in Section 1635(f)?

The answer is "yes," if state law generally allows rescission to be asserted as a defense. The Supreme Court of Florida, however, erroneously concluded that the answer to this question is "no," because that court viewed Section 1635(f) as a strict statute of repose that, after three years, absolutely *prohibits* rescission under state or federal law. The Florida court ruled that no defense of rescission was permitted in state foreclosure proceedings after three years because:

> [S]ection 1635(f) explicitly provides that *both the right and the remedy expire* three years after the closing date. . . .
>
> Therefore, . . . we read that section as unambiguously expressing Congress's intent to extinguish the statutory right of rescission three years after the transaction's closing.

J.A. 170-171 (citations omitted).

That interpretation of Section 1635(f) is wrong. Indeed, the 1995 Truth in Lending Act (TILA) Amendments make clear that the Supreme Court of Florida misconstrued Congress's intent. Section 1635(i)(3) of the 1995 Amendments, which that court deemed to be irrelevant, provides:

> **(3) Right of Recoupment Under State Law**
> Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

This amendment and its legislative history cannot be reconciled with the claim that rescission in recoupment cannot be raised as a defense after three years. The dissenting judge in the Florida District Court of Appeal recognized that this amendment "runs contrary to an interpretation that Congress intended to treat the right of rescission as a strict statute of repose" that imposes a federal prohibition on raising it as a defense. J.A. 145. Moreover, the right of rescission preserved by this amendment is available under Florida law, which permits rescission based on "an otherwise-expired cause of action to be raised as an affirmative defense or a compulsory counterclaim." J.A. 151. The dissenting opinion reflects the proper view of TILA and demonstrates that if the Supreme Court of Florida had not misconstrued Section 1635(f) as a strict statute of repose the Beaches' rescission defense would not have been barred.

Ocwen itself acknowledges that Congress "in no way meant to preempt the borrower's state law rescission rights if available in recoupment." (Respondent's Br. 18); *accord id.* at 4 (after the time period in Section 1635(f) expires, "borrowers retain whatever rescission rights they have under state law."). Thus, even Ocwen admits that Section 1635(f) does not preempt state law, and that a right of rescission may be revived as a defense in recoupment beyond the three-year limit if state law provides a basis for doing so.

Nevertheless, Ocwen argues that the judgment below should still be affirmed because (1) the Beaches never asserted that they have any right of rescission under state law (Respondent's Br. 2, 7, 8); and (2) state law may only permit rescission as a defense in state proceedings if there is "a showing of fraud, duress, or coercion." *Id.* at 19. The first claim is incorrect because the Beaches relied on both federal and state law, and the Supreme Court of Florida rejected their defense because it concluded that Section 1635(f) prohibited rescission in recoupment under *any* law. The second claim is untenable because nothing in Section 1635(f) or 1635(i)(3) supports Ocwen's claim that federal law allows state foreclosure proceedings to recognize defensive rescission *only* if the defense is based on fraud, duress or coercion.

To the contrary, this Court's prior cases on recoupment show that to prevail on this claim, Ocwen must show that the "clearest congressional language" expressly precludes rescission in recoupment under TILA, state law, and federal common law. Ocwen's argument fails because TILA's language does not contain any language that expressly forecloses post-3-year rescission in recoupment, nor any language that preempts state law from permitting such defenses.

Finally, the hyperbolic submissions of lending industry gloom and doom, which permeate the briefs of Ocwen and its *amici*, are unfounded and irrelevant – unfounded because they are untrue, and irrelevant because complaints about TILA's consequences should be addressed to Congress, not this Court. Long before the Supreme Court of Florida's decision in this action, other courts held that the general principle that defenses based on the

lenders' wrongdoing may be raised as defenses in state foreclosure proceedings applies to defenses of rescission in recoupment based on violations of TILA. These holdings have not brought on any of the disastrous consequences the lenders predict, and this Court should confirm the conclusion of these prior decisions that the time limitation in Section 1635(f) does not apply to recoupment defenses in state foreclosure proceedings.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY OF TILA SUPPORT THE PETITIONERS' POSITION

A. The Language

"[C]learest congressional language" is the *sine qua non* for finding congressional intent to bar defenses in recoupment. *Reiter v. Cooper*, 507 U.S. 258, 264 (1993) (*quoting United States v. Western Pacific R. Co.*, 352 U.S. 59, 71 (1956)). Ocwen's efforts to overcome this well-established presumption that statutory limitation periods do not apply to defenses in recoupment are unpersuasive.

First, Ocwen argues that Congress has used the clearest language possible because Section 1635(f)'s use of the words "shall expire" could not have been clearer in precluding the statutory right of rescission as a defense in recoupment. *See* Respondent's Br. 12. ("It is difficult to imagine how Congress could have been more clear. . . . "). But where Congress wished to bar recoupment in the past, it has done so by specifically using the terms "recoupment" or "recoup." *See, e.g.*, 14 U.S.C. § 726(d) ("[I]f an

overpayment of pay or allowances results . . . the overpayment is not subject to recoupment"); 26 U.S.C. § 418D(c) ("A plan may not recoup a benefit payment which. . . . "); 29 U.S.C. § 1425(c) ("A [ERISA] plan may not recoup a benefit payment which is in excess of the amount payable under the plan. . . . "); 30 U.S.C. § 191a(c) ("Prohibition against recoupment" [federal mineral leases]) ("[N]o part of any such payment or distribution shall be recouped from the State or other recipient."). The Truth in Lending Act contains no such explicit limitation on recoupment and, as we discuss below, Congress rejected amendments that would have added such a limitation.

Second, Ocwen argues that the rule that a statutory limitation period does not bar recoupment unless the language makes clear that Congress intended to bar such defenses does not apply to Section 1635(f) because this rule "applies only to ordinary statutes of limitation." Respondent's Br. 27. This claim is without merit. Neither *Bull v. United States*, 295 U.S. 247 (1935), nor this Court's more recent cases affirming this rule restrict its application to particular types of limitation periods. To the contrary, *Western Pacific* noted that, even if the limitation period at issue were jurisdictional, this clear statement rule still applied because:

> Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit.

Western Pacific, 352 U.S. at 71. In *Reiter*, the Court commented with approval that the "Courts of Appeals have understood *Western Pacific* as expressing not just a narrow holding based on the United States set-off statute,

but a general principle of recoupment applicable in other contexts." 507 U.S. at 264. This general principle applies here, where the right to rescind grows out of a transaction that violates federal law and the question is whether Congress has clearly said a lender can violate the Truth in Lending Act and escape rescission by waiting more than three years to file a foreclosure suit.

Moreover, contrary to Ocwen's or the Supreme Court of Florida's view, it is not the nomenclature – whether a provision is labeled a statute of "limitations" or "repose" – that determines the availability of the recoupment defense. Instead, the statutory language is determinative. The language of Section 1635(f) does not state that Congress intended to take the extraordinary step of imposing a time limitation on recoupment defenses.

Third, Ocwen acknowledges that in Section 1635(i)(3) Congress has "preserved any state law right of rescission in recoupment from implied preemption." Respondent's Br. 21. This concession is critical because it demonstrates that TILA leaves open the "right of rescission in recoupment under state law."

Ocwen, however, attempts to artificially limit Section 1635(i)(3) by asserting that only "state law" rescission is available, and then only "to borrowers who could prove that they are entitled to the extraordinary relief of rescission, generally by demonstrating actual fraud, duress or coercion." Respondent's Br. 8. This claim, however, is devoid of any support in statutory language or legislative history. Nowhere does the statute intimate such a cramped view of the borrower's right to rescission in recoupment. Nor does it provide any support for

Ocwen's convoluted theory that Section 1635(i)(3) preserves rescission in recoupment under state law only if it is based on the grounds listed by Ocwen, but Congress has preempted states from recognizing the very same remedy if the remedy is based on violations of TILA.

Indeed, it is well established that, unless Congress specifically preempts state action, states may provide remedies based on federal rights and for violation of federal standards. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, ___ (1996); and *id.* at ___ ("Where a state cause of action seeks to enforce an FDCA requirement, that claim does not impose a requirement that is 'different from or in addition to' requirements under federal law") (O'Connor, J., concurring in part and dissenting in part). There is no reason why state foreclosure proceedings may not recognize rescission in recoupment for violations of TILA, and a number of courts have recognized recoupment defenses based on the federal right.[1] The Supreme Court of Florida, however, erroneously concluded that Section 1635(f) preempted state foreclosure proceedings from permitting rescission in recoupment after three years. Because that reading of the statute is incorrect, the question presented must be answered affirmatively and the decision below reversed.

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[1] *See Dawe v. Merchants & Trust Corp.*, 683 P.2d 796 (Colo. 1984); *F.D.I.C. v. Ablin*, 532 N.E.2d 379 (Ill. App. 1988); *Community National Bank & Trust Co. v. McClammy*, 525 N.Y.S. 2d 629 (App. Div. 1988). Indeed, as noted in our opening brief and emphasized by *amici*, a state may not discriminate against the federal right in applying its law concerning the availability of recoupment defenses in foreclosure proceedings. *See* Petitioners' Br. at 31; Botelho Br. at 20-23.

B. The Legislative History

Ocwen's contention that Congress intended to preclude the statutory right of rescission as a defense in recoupment is also belied by the legislative history of Section 1635(i). In *Bennett v. Kentucky Dept. of Education*, 470 U.S. 656, 665 n.3 (1985), and *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 544 n.44 (1979), this Court noted that Congress's express rejection of proposed legislation can be persuasive evidence of Congress's intent. Such evidence is presented here because in 1995 Congress explicitly rejected proposed amendments that, using the clearest of congressional language, would have prevented any rescission in recoupment beyond the Section 1635(f) three-year period. *See* Petitioners' Br. 23-24; Botelho Amicus Br. 14-16; AARP Amicus Br. 15-19, 21. For example, Representative McCollum's *rejected* bill would have amended Section 1635(f) to make its three-year limitation on rescission "absolute" so that "no consumer may assert rescission, affirmatively or as a defense, in any action in any state or Federal Court after the earlier of the end of the 3-year period . . . or the sale of the property. . . . " H.R. 1184, § 7, 104 Cong., 1st Sess. (1995).[2] The fact that Congress rejected this language, and instead, enacted Section 1635(i)(3) to remove any inference that recoupment rights under state law were preempted, demonstrates that the Supreme Court of Florida misconstrued congressional intent. Moreover, the fact that Section 1635(f) does not include the explicit language

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[2] The full text of section 7 of this bill is set forth in Petitioners' Br. 23, n. 9 and Botelho Amicus Br. 15.

proposed in these 1995 amendments illustrates that Congress could have used language that satisfied the clear statement rule set forth in *Reiter* and *Western Pacific*, but it chose not to do so.

Ocwen argues that this legislative history actually supports its claim that Section 1635(f) requires that a right to rescission be excised within three years of the loan closing, "or be barred forever." Respondent's Br. at 21. The evidence that Ocwen offers to support this claim, however, shows that the assertion is without merit. Ocwen does not cite the language that Congress actually enacted, but relies on the statements of Sen. Mack and Rep. McCollum, the sponsors of the rejected bills, which would have explicitly precluded rescission "in any State or Federal court" after the end of the three-year period in Section 1635(f). *Id.* Such isolated floor remarks do not provide a useful basis for construing the results of the legislative process where, as here, Congress rejected the language proposed by these congressmen and their statements appear to simply resurrect the position that Congress refused to adopt. The floor statement of Senator Sarbanes (*see* AARP Amicus Br. 21), supports the opposite conclusion that Congress decided not to restrict rescission in recoupment, and reflects the only fair interpretation of Congress's rejection of the Mack/McCollum bills. Most importantly, Senator Sarbanes' statement is entirely consistent with the language actually adopted.

That language, Section 1635(i)(3), precludes the precise argument that Ocwen is now making. Ocwen's interpretation that this provision merely preserves state rescission in recoupment law if it is unrelated to TILA is untenable. First, Ocwen's reading of Section 1635(i)

would render the entire provision impermissibly superfluous because TILA already explicitly safeguards such elements of state law (Section 1610(a)(1)), and no case or other authority had ever suggested otherwise. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("a statute must, if possible, be construed in such a fashion that every word has some operative effect"). In addition, Ocwen's interpretation requires that the term "rescission" in Section 1635(i)(3) be interpreted to refer exclusively to some unnamed state law right or rights of rescission, while the meaning of "rescission" in every other sentence in Section 1635 is limited to TILA rescission. That interpretation violates the fundamental rule of statutory construction that the same term appearing in different portions of a statute must be given the same meaning. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

II. THE TRUTH IN LENDING LAW PROTECTS CONSUMERS AND POSES NO DANGERS TO THE MORTGAGE INDUSTRY

Ocwen's "equitable" and "policy" arguments overlook the fact that Congress has already rejected them. Despite the mortgage industry's opposition to rescission and its efforts to obtain an absolute bar on rescission after three years, Congress has incorporated rescission in recoupment as an appropriate post-3-year remedy. Congress has weighed the policy considerations regarding lenders' liability for Truth in Lending violations, immunizing lenders or limiting the remedies for some violations. The violations here have been determined by Congress to be sufficiently important to permit rescission. Thus, the question in this case is not the amount of the

lender's error, it is whether the rescission remedy can be raised as a defense in recoupment.

Moreover, if questions arise in individual cases concerning whether permitting rescission is equitable, Congress left courts with discretion to consider the equities in such cases: "The procedures prescribed by this subsection shall apply except when otherwise ordered by a court." 15 U.S.C. § 1635(b); *see also* 12 C.F.R. § 226.23(d)(4). Thus, courts are specifically authorized to exercise their equitable power to protect the lender, and many reported decisions provide examples of courts using their equitable authority to ensure that a creditor collects the net principal due. *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992); *Shepeard v. Quality Siding & Window Factory, Inc.*, 730 F. Supp. 1295, 1308 (D. Del. 1990); *see also Ljepava v. M.L.S.C Properties Inc.*, 511 F.2d 935, 944-45 (9th Cir. 1975); *Rowland v. Magna Milikin Bank of Decatur*, 812 F. Supp. 875, 881 (C.D. Ill. 1992); *Aquino v. Public Cons. Finance Co.*, 606 F. Supp. 504, 511-512 (E.D. Pa. 1985); *Mayfield v. Vanguard Sav. & Loan*, 710 F. Supp. 143, 146-149 (E.D. Pa. 1989); *In re Michel*, 140 B.R. 92, 101 (Bankr. E.D. Pa. 1992). The decision below, however, is based on the conclusion that there is a rule of law that bars rescission in recoupment three years after closing, and not on any effort to adjust the rescission procedures in light of the equities of this particular case. Whether rescission may result in disproportionate losses to lenders or gains for borrowers in an individual case is irrelevant to whether the Court below correctly concluded that Section 1635(f) prohibits rescission in recoupment after three years in *all* cases.

This Court requires lenders to complain to Congress, not courts, for relief from liability for minor technical errors. *Mourning v. Family Publications Services, Inc.*, 411 U.S. 356, 378 (1973) ("It is not a function of the Courts to speculate as to whether the evils sought to be remedied could better have been regulated in some other manner."); *see also Gennuso v. Commerical Bank & Trust Co.*, 566 F.2d 437, 443 (3rd Cir. 1977). Congress ended liability for minor technical errors in 1980, *Dixie v. Idaho 1st National Bank*, 677 F.2d 749, 753 (9th Cir. 1982), and imposes § 1635 rescission only for material errors. *Steele v. Ford Motor Credit Co.*, 783 F.2d 1016, 1019 n.3 (11th Cir. 1986). Creditors made the technical liability argument to Congress in 1995, leading to the passage of § 1605(f) ("Tolerances for Accuracy"). Congress rejected the technical liability argument for consumers facing foreclosure and elected to protect these consumers even for relatively small technical errors that exceed the low $35.00 tolerance. *See* § 1635(i)(2).

Ocwen and its *amici* also seek to alarm the Court with confusing figures on the potential harm to the secondary mortgage market, should the Court find for Petitioners. The alarums are not convincing. A lender has an affirmative duty to decline TILA-violative loans. *Shepeard v. Quality Siding & Window Factory, Inc.*, 730 F. Supp. 1295, 1301 n. 8 (D. Del. 1990). An assignee who exposes itself to rescission by taking a voluntary assignment of a TILA-violative loan is not "innocent" (Respondent's Br. 30) or "totally blameless" (Fed. Home Loan Mortg. Corp. Amicus Br. 17, 18 n.14). Such an assignee commits a TILA violation by taking the loan. *Shepard, supra*. Congress wanted to restrict free assignment of loans that violate

the Act by making assignees responsible without regard to fault. § 1641(c). If secondary buyers refuse TILA-violative loans, originators will be motivated to close loans that comply with TILA. Restricting secondary purchasers keeps illegal loans off the market and protects consumers by encouraging lenders to comply with the Truth in Lending Act in the first instance.

Neither Ocwen nor its *amici* presents any empirical data to show that rescission after three years adversely affected the mortgage industry, the secondary market or consumers in Colorado, Illinois, or New York, states that have allowed post-3-year rescission in recoupment for up to fourteen years. *See Dawe v. Merchants & Trust Corp.*, 683 P.2d 796 (Colo. 1984); *F.D.I.C. v. Ablin*, 532 N.E.2d 379 (Ill. App. 1988); *Community National Bank & Trust Co. v. McClammy*, 525 N.Y.S. 2d 629 (App. Div. 1988). Neither Ocwen nor its *amici* presents empirical data to suggest that consumers strategically default in Colorado, Illinois or New York. The notion that consumers would risk their homes as part of a strategy to rescind in recoupment under the authority of those cases assumes a degree of calculated scheming or recklessness among consumers that this Court should not indulge.

A decision adverse to Ocwen will not affect the secondary mortgage industry. The industry has thrived under the pre-*Beach* doctrine that rescission in recoupment is not limited to the § 1635(f) period. *Beach* may have raised expectations of post-3-year invincibility in Florida, but in the other 49 states *Dawe* and its progeny have controlled and the secondary mortgage industry has not suffered.

Ocwen and its *amici* claim that 2,700 of 3,500 lenders commit at least one TILA violation, seeking to alarm the Court with astronomical potential liability. Fed. Home Loan Mortg. Corp. Amicus Br. 19 n. 17. The "2,700 lenders who err" argument overlooks the fact that not all TILA errors give rise to or extend the right to rescind; only the failure to provide "material" disclosures does so. 12 C.F.R. § 226.23(a)(3) n.2.

Using the *amici's* proffered data (Fed. Home Mortg. Br. 19 n. 16), it is clear that only a small percentage of loans might qualify to assert the right to rescission. As they posit, only loans that are (1) over three years old, (2) in foreclosure, and (3) a qualifying loan (such as a refinancing), are at issue. That would be, at most, less than one in 1000 existing loans. That number is the product of the various factors:

Loans over 3 years old x in foreclosure x qualifying =

45% (1.8 trillion / 4 trillion) x 0.7% x 40% = .00126

Only 77% of *those* loans contain errors (2,700 of 3,500 lenders), so the final product is 77% x .00126 = 0.0009702. Thus, even assuming that *all* those errors are material and might actually support rescission, the number is less than one in a thousand. In reality, it would be less. And whatever the number – if the industry is violating the Truth in Lending Act – it is the *industry* which should bear the cost of its negligence, not the consumers whom the Truth in Lending Act seeks to protect. *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 878 (7th Cir. 1976) ("Congress had no intention of having the consumer bear the burden of a creditor's negligence"), *overruled on other grounds, Brown v. Marquette Sav. and Loan*

Ass'n, 686 F.2d 608 (7th Cir. 1982). *Amici's* numbers are a diversion, and the argument that the magnitude of the industry's errors should persuade this Court to overlook TILA's consumer protective purpose and to construe TILA to protect the industry is clearly contrary to congressional intent.

Ocwen, and its *amici*, seek to portray this case as a threat to "a stable and healthy secondary mortgage market." Fed. Home Loan Mortg. Corp. Amicus Br. 26. There is no evidence, real or anecdotal, that supports that submission. This case must be decided based on Congress's plain and clear § 1635(i)(3) statement that TILA rescission in recoupment is alive and well after three years, if state law permits recoupment: "Nothing in this subsection affects a consumer's right of rescission in recoupment under State law."

CONCLUSION

The decision of the Supreme Court of Florida should be reversed and the case remanded for further proceedings in accordance with federal and Florida law.

Respectfully submitted,

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No. 97-5310

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DAVID R. AND LINDA M. BEACH,
Petitioners,

v.

OCWEN FEDERAL BANK,
Respondent.

On Writ of Certiorari
To The Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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STATEMENT OF THE CASE

AARP adopts the Petitioners' statement.

STATEMENT OF INTEREST[1/]

The American Association of Retired Persons (AARP) is the nation's leading organization for people age 50 and older. Approximately twenty-five and one-half million of its members are homeowners.[2/] In representing the interests of its members, AARP seeks to: (1) enhance the quality of life for individuals as they grow older; (2) further independence, dignity and purpose for individuals as they grow older; and (3) improve the image of aging.

AARP's advocacy efforts have focused on disclosure protections and combating fraud and abuse against older people in a wide range of consumer transactions. AARP has appeared as *amicus curiae* in numerous federal and state court proceedings that impact the rights and interests of older persons. AARP has expressed particular interest in the two most recent amendments to the Truth in Lending Act ("TILA"). AARP advocated for passage of the Home Ownership and Equity Protection Act of 1994 ("HOEPA") which amended TILA to provide increased protections for homeowners targeted by unscrupulous and high cost lenders.[3/]

[1/] Consents filed Nov. 26, 1997. AARP's brief has not been approved or financed by petitioners or their counsel, or any other party.

[2/] In addition, seventy-eight percent of the sixty-five plus population are homeowners. India Walsh, U.S. Bureau of the Census and the Department of Housing and Urban Development, *American Housing Survey* (1995).

[3/] Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2190-94 (Subtitle B of Title I, known as the Home Ownership and Equity Protection Act of 1994, effective for loans consummated after October 1, 1995, amends

(continued...)

In addition, AARP sought to modulate the industry's efforts to roll back consumer protections in the 104th Congress through participation in the legislative process leading up to the 1995 Amendments to TILA. AARP has been a long-time advocate of enhanced protections for consumers in areas affecting home ownership and consumer credit. Through comments before federal agencies in rulemaking proceedings, AARP has continued to express its views on behalf of members who are impacted by the Truth in Lending Act.[4/]

Over the past six years, AARP-sponsored Legal Counsel for the Elderly (LCE)[5/] has represented over one hundred elderly, low income homeowners who have been victimized by abusive and predatory home equity lenders. Through this representation, AARP has gained a heightened awareness of the fraudulent practices of a segment of the mortgage lending industry that pose a threat to elderly homeowners. Moreover, AARP is concerned that these practices are not diminishing, but are becoming more widespread throughout the mortgage lending industry.[6/] The abuses experienced by many older

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3/(...continued)
TILA, 15 U.S.C. §§ 1602 and 1639.)

4/ In addition, AARP recently participated in a 1997 Federal Reserve Board hearing which addressed whether the finance charge under TILA should be redefined to include all costs associated with the extension of credit. *Federal Reserve Board Hearing on Finance Charges* (June 17, 1997) (testimony of Jean Constantine-Davis, Staff Attorney AARP) (on File at AARP).

5/ LCE is a separate 501(c)(3) organization that receives support from AARP and its affiliate, the AARP Foundation.

6/ AARP testified at a hearing before the Federal Reserve Board on concerns regarding abuse in the home equity lending market. *Federal Reserve Board Hearing on HOEPA*. (June 17, 1997) (testimony of Nina (continued...)

homeowners often challenge the most basic tenets of TILA, such as failing to provide homeowners with disclosures and loan documents until after the running of the three-day rescission period.

AARP submits this brief as *amicus curiae* to inform the Court regarding its members' interests in retaining the right to assert TILA rescission as a claim in recoupment. AARP urges the Court to reverse the Florida Supreme Court's decision in *Beach*[7/] and to preserve this very important right for homeowners faced with foreclosure.

SUMMARY OF ARGUMENT

Petitioners and consumer *amici* seek to preserve legal concepts substantially settled under the Truth in Lending Act for the last seventeen years, and recognized in the federal doctrine of recoupment since at least 1935. Respondent and the mortgage industry *amici* oppose the well established doctrine of rescission in recoupment and seek to obtain from this Court the relief they failed to obtain from Congress.

Prior to the decisions in *Beach,* it was well established that homeowners could defend against a lender's foreclosure action by raising a claim of rescission in recoupment. In fact, in at least six decisions since 1984, the Truth in Lending Act has been interpreted to allow defensive rescission in recoupment after the statute of limitations on affirmative claims had run. The Florida courts' decisions in *Beach*

6/(...continued)
F. Simon, Staff Attorney AARP) (on File at AARP).

7/ *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997), *aff'g* 670 So.2d 986 (Fla. Dist. Ct. App. 1996), *cert. granted sub nom., Beach v. Ocwen Fed. Bank*, 18 S.Ct. 294 (U.S. Oct. 14, 1997) (97-5310).

deviated from the well established, informed, and reasoned judicial consensus on this issue.

The *Beach* court failed to recognize the centrality of rescission to TILA's self-enforcing statutory scheme. While the 1995 Amendments to TILA granted the mortgage industry relief from certain kinds of misdisclosures, Congress' intent to grant special protection--including rescission in recoupment--to borrowers facing foreclosure is clear from both the plain language and legislative history of these amendments. Congress recognized the need to allow these homeowners the right to statutory defenses which may have lain dormant because most homeowners do not assert rescission claims until the lender presents no other option. The *Beach* court ignored Congress' rejection of industry sponsored legislation to expressly eliminate TILA's recoupment defense. Moreover, the *Beach* court misinterpreted the doctrine of federal recoupment and improperly employed state law to deny access to this valuable federal claim.

This brief demonstrates that the rescission remedy furthers the compelling public policy which underlies the Truth in Lending Act. The 1995 Amendments require reversal of the Florida court decision. The brief examines the faulty reasoning underlying the *Beach* decision and demonstrates that the public policy underlying TILA is strengthened by the existence of the recoupment claims here challenged. These claims enable people to preserve their homes and vindicate their right to be fully informed of the terms of their mortgage loans.

Beach's abolition of rescission in recoupment poses a very real threat to individual homeowners, many of whom have been victimized by unscrupulous lenders. Under *Beach*, lenders would be permitted to benefit from their wrongdoing and foreclose, despite often gross violations of Truth in Lending disclosure obligations. The real risk is that

individual rights to fair play in the home loan arena will be further eroded if the holding in *Beach* is not reversed.

ARGUMENT

I. THE RIGHT OF RESCISSION IS CRITICAL TO THE SELF-ENFORCEMENT STATUTORY SCHEME OF TILA.

A. TILA Is A Remedial Statute Whose Self-Enforcement Scheme Is Dependent On Rescission.

TILA was enacted to insure that consumers are properly informed of the terms of their credit, to protect consumers from divergent and often fraudulent practices,[8/] and to balance the scales thought to be weighted heavily in favor of lenders.[9/] TILA creates a system of disclosure that improves the bargaining posture of all borrowers and requires strict technical compliance,[10/] regardless of actual injury, thereby promoting the standardization of credit terms for the benefit of all consumers. *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982); *Johnson v. Steven Sims Subaru Inc.*, No. 92 C6355, 1993 U.S. Dist. LEXIS 8078 *4,

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[8/] *See In re Shaw*, 178 B.R. 380, 385 (Bankr. D.N.J. 1994).

[9/] *Bizier v. Globe Fin. Servs., Inc.*, 654 F.2d 1, 3 (1st Cir. 1981); *see also N.C. Freed Co. v. Board of Governors*, 473 F.2d 1210, 1214 (2d Cir. 1973), *cert. denied*, 414 U.S. 827 (1973).

[10/] Courts have imposed strict liability under TILA even where violations are perceived to be technical or minor. *New Maine Nat'l Bank v. Gendron*, 780 F. Supp. 52, 57 (D. Me. 1991); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983); *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 704 (9th Cir. 1986).

(N.D. Ill. 1993); *Smith v. Chapman,* 614 F.2d 968, 971 (5th Cir. 1980).

The right to rescind is pivotal to enforcement of TILA's statutory scheme, acting as a deterrent to creditors who would otherwise violate consumer rights to meaningful disclosure. *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1140 (11th Cir. 1992). The inclusion of the right to rescind in TILA was a recognition of the preeminence home ownership had achieved in the United States and the need to safeguard it from the misrepresentations and fraudulent practices of an unregulated marketplace.[11/] This role was reinforced by the recent amendments creating HOEPA, in which the right of rescission was selected as the remedy of choice to enforce compliance with new statutory requirements and prohibitions.[12/] Moreover, the public is dependent on individual consumers acting as "private attorneys general" to enforce the disclosure system envisioned by TILA. *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978).

In creating the extended right to rescind a loan transaction, Congress expressed a strong public policy mandating disclosure of material terms of the loan transaction. Congress determined that this policy was of such importance that it created the unique and powerful private enforcement mechanism of rescission to ensure lender compliance with disclosure obligations. While the remedy has been the subject of criticism in recent years, the severity of the remedy is directly proportional to the severity of the potential loss suffered by homeowners who lose their homes to foreclosure. Congress understood that TILA must be, to a large extent,

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[11/] *See* Ralph J. Rohner, *The Law of Truth in Lending*, ¶ 8.01[3] at 8-4 (1984).

[12/] *See* discussion of HOEPA *infra* pp. 27-30 and *supra* note 3.

self-enforcing.[13/] The powerful remedy of rescission was Congress' tool of choice to police compliance.

B. The 1995 Amendments Emphasize The Importance of Rescission In Foreclosure.

A few years ago, the case of *Rodash v. AIB Mortgage, Co.*[14/] created concern in the mortgage lending industry that lenders might be subject to liability on a large scale for violations of the Truth in Lending Act. Many of the industry *amici* represented in this case sought relief from Congress from this liability, arguing that "technical" and "inconsequential" errors could cause losses of $217 billion and could "potentially impair the safety and soundness of all types of lenders."[15/] (*See* Letter from Rep. Bill McCollum, 3/8/95) (App. 1).

Congress responded to this plea for relief in September 1995 by enacting the Truth in Lending Act Amendments.

[13/] *Williams*, 968 F.2d at 1140. *See also, Aquino v. Public Fin. Consumer Discount Co.*, 606 F. Supp. 504, 508 (E.D. Pa. 1985).

[14/] 16 F.3d 1142 (11th Cir. 1994). It is important to note that while the *Rodash* decision generated a great deal of controversy regarding the more technical violations in Mrs. Rodash's mortgage loan, the decision to allow her to rescind was independently based on the court's finding that the creditor committed a material violation of TILA by having her sign at closing an "Election Not to Cancel" which effectively vitiated her right to rescind. *Rodash*, 16 F.3d at 1145-48.

[15/] *Truth in Lending Act Amendments of 1995: Hearings Before Fin. Insts. and Consumer Credit Subcomm. of House Banking and Fin. Servs. Comm.*, 104th Cong. (1995) (testimony of American Bankers Ass'n); *Truth in Lending Act Amendments of 1995: Hearings Before Subcomm. on Fin. Insts. and Regulatory Relief of the Senate Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. (1995) (testimony of Consumer Bankers Ass'n).

AARP took a special interest in this legislation, attempting to strike a balance between the mortgage industry's desire for relief and the need to protect the integrity of TILA for homeowners, young and old. The 1995 Amendments granted the mortgage industry relief by creating a moratorium on class action lawsuits based on misdisclosure of certain fees and charges and by retroactively forgiving misdisclosure of those fees and charges. Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 276 (codified as amended at 15 U.S.C.A. §§ 1601-1649 (1995)).[16/] This was the limited relief that was necessary to prevent the catastrophe predicted by the industry as a result of *Rodash*.

However, at the industry's behest, the 1995 Amendments to TILA went further. In many cases, disclosure errors no longer entitle consumers to relief, nor subject creditors to liability since the industry is now permitted to treat *as accurate* erroneous disclosures of the finance charge, ranging from one half of one percent to one percent of the loan amount.[17/] While misdisclosures of certain fees were simply forgiven across the board, other disclosure violations were retained intact. Violations such as misdisclosure of the

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[16/] Individual rescission claims, asserted prior to June 1, 1995-- such as the Beaches'--are grandfathered and are not subject to the retroactive immunity afforded the mortgage industry. 15 U.S.C. § 1649(b).

[17/] *See* discussion *infra* note 21. While the 1995 Amendments raised:

> . . . the bar that determines what constitutes a violation. . . . to protect lenders from the small errors in judgment that occurred in the *Rodash* case. . .[i]t is obviously not intended to give lenders the right to pad fees up to the tolerance limit . . . .

141 Cong. Rec. S14567 (Sept. 28, 1995) (statement of Sen. Sarbanes). Despite the fact that the 1995 Amendments allow more "play" in disclosing the finance charge, they retain the strict liability standard for other material disclosures and for finance charge disclosures outside the new tolerances.

broker's fee were forgiven as long as the borrower was not in foreclosure.[18/] In addition, while some members of the mortgage industry sought to have Congress make rescission unavailable in recoupment,[19/] others urged that rescission be eliminated altogether.[20/] *See infra* Part II. A.

In the face of these generous tolerances and forgivenesses, it is difficult to explain industry concerns regarding the burdens of TILA. Most of the technical violations that might subject lenders to liability were forgiven and even where violations have not been forgiven, large tolerances for errors have drastically reduced the industry's exposure to liability as compared to that which existed just two years ago. And yet, the industry is unsatisfied with the relief accorded them by Congress and demands more.[21/]

[18/] 15 U.S.C. §§ 1635(i)(1)(A), 1649.

[19/] *See supra* note 15 (testimony of American Bankers Ass'n. and Consumer Bankers Ass'n.)

[20/] The National Association of Federal Credit Unions (NAFCU) advocated the repeal of TILA, while the Credit Union National Association (CUNA) urged the elimination of the three day right of rescission for most loans. *Truth in Lending Act Amendments of 1995: Hearings Before House Banking Fin. Inst. & Consumer Credit Subcomm.*, 104th Cong. (May 23, 1995) (testimony of NAFCU and CUNA).

[21/] Prior to the 1995 Amendments to TILA, homeowners who received inaccurate disclosures of the finance charge that varied by more than $10 from the accurate finance charge and whose inaccuracy was based on the creditor's erroneous *legal conclusion* and not on a *bona fide error*, were permitted to rescind their mortgages. 12 C.F.R. pt. 226.18(d), n. 41 (1995) ("Regulation Z"); 15 U.S.C. § 1640(c). Following the 1995 Amendments, homeowners lost their right to rescind for disclosure violations based on, for example, the creditor's failure to include the broker's fee in the finance charge (for loans

(continued...)

C. Subsection 1635(i) Revives Rescission Rights in Foreclosure.

Having reduced the remedies available to many home borrowers, particularly the right of rescission, Congress was careful to recognize the class of borrowers in foreclosure as especially deserving of heightened protections. In the foreclosure context, Congress retained the remedy of rescission largely intact, determining that stricter rules of compliance and greater access to rescission were required. 15 U.S.C. §1635(i).

Congress revived the right of rescission for a borrower facing foreclosure where disclosure violations fall in any one of three categories[22/] or when raised as a claim in recoupment.

[21/](...continued)
before October 1, 1996), 15 U.S.C. § 1649(a)(1)(D), or if the finance charge disclosure is considered *accurate* because errors of up to ½ of 1% of the finance charge are *tolerated* (this could amount to as much as $500 on a loan of $100,000). 15 U.S.C. § 1605(f). Under this complex scheme, some homeowners may be entitled to file suit for statutory damages based on the defective finance charge disclosure, but are not eligible to rescind. That is because there is a lower threshold for tolerating inaccuracies in the finance charge when the homeowner is seeking statutory damages than when seeking rescission, with the result that a disclosure is considered *accurate* or *inaccurate*, depending on the remedy sought. If, however, such homeowners should later fall into default and are faced with foreclosure, two of the otherwise-forgiven disclosure errors (with a $35 tolerance for accuracy) are revived as a basis for the homeowner to assert a right to rescind. 15 U.S.C. § 1635(i). If the creditor seeks to foreclose within three years from consummation of the loan, the borrower's right to rescind is fully revived and can be asserted through an affirmative suit for rescission, either in state, federal or bankruptcy court or can be raised as a defense in response to a foreclosure action. 15 U.S.C. § 1635(i)(3).

[22/] The three categories of disclosure violations which were forgiven for (continued...)

This statutory relief provided by 15 U.S.C. § 1635(i) is directly applicable to Mr. and Mrs. Beach in that it reaffirms their ability to rescind in recoupment after three years.[23/]

D. The Analysis Underlying *Dawe* And Its Progeny Supports The Purposes Of TILA.

As the vast majority of courts which have considered this issue have concluded, the three-year limit on the right of rescission is a statute of limitations, and does not bar defensive rescission. *Dawe v. Merchant's Mortgage and Trust Corp.*, 683 P.2d 796, 800 (Colo. 1984); *In re Shaw*, 178 B.R. 380, 386-87 (Bankr. D.N.J. 1994); *Community Nat'l Bank & Trust Co. v. McClammy*, 525 N.Y.S.2d 629 (N.Y. App. Div. 1988);[24/] *FDIC v. Ablin*, 532 N.E.2d 379, 382 (Ill. App. Ct. 1988); *Westbank v. Maurer*, 658 N.E.2d 1381, 1389-91 (Ill. App. Ct. 1995); *In re Botelho*, 195 B.R. 558 (Bankr. D. Mass. 1996), *appeal docketed*, *Citicorp Mortgage Inc. v. Botelho*, No. 97-535 (1st Cir. May 7,

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[22/](...continued)
borrowers generally and revived for borrowers in foreclosure are violations based on failure to include the broker's fee in the finance charge, (15 U.S.C. § 1635(i)(1)(A)); failure to provide the proper form of notice of right to rescind (§ 1635(i)(1)(B)); and underdisclosure of the finance charge by more than $35 (§ 1635(i)(2)).

[23/] As §1635(i)(4) makes clear, §1635(i)(3) is applicable to all loans in existence on or after September 30, 1995, including the Beaches' mortgage transaction.

[24/] Adopting an independent analysis which did not rely on *Dawe*, New York's Appellate Division reached the identical result. The court permitted the homeowner to raise a claim for TILA rescission as a defense to a foreclosure action, finding that the rescission claim "would arise out of the same transaction as that sued upon." *McClammy*, 525 N.Y.S.2d at 631-2. *See also First Trust Nat'l Ass'n v. Chiang*, 662 N.Y.S.2d 136, 137 (N.Y. App. Div. 1997) (mem.).

1997).[25/] Prior to the Florida courts' recent decisions in *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997), *aff'g* 670 So.2d 986 (Fla. Dist. Ct. App. 1996), there were no court decisions denying a homeowner the right to assert a time-barred claim for rescission as a claim in recoupment.[26/]

The *Dawe* case has been the law for thirteen years with no apparent ill effects on the mortgage industry. We are therefore concerned about the mortgage industry's resort in these cases to predictions of dire consequences should this Court uphold the clear Congressional mandate to allow rescission in recoupment. In briefs before the Court of Appeals for the First Circuit, industry *amici* predict a "flood of litigation," "avalanche of individual cases," and billions of dollars of losses.[27/] These claims are reminiscent of the

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[25/] *See also, Taylor v. Domestic Remodeling, Inc.*, 97 F.3d 96 (5th Cir. 1996).

[26/] In contrast, equitable tolling has *not* expanded the three-year limitations period to permit a direct, *affirmative* claim for rescission, even in the face of intentional and fraudulent concealment. *King v. California*, 784 F.2d 910, 913-16 (9th Cir. 1986). The distinction between rescission by equitable tolling and rescission in recoupment is very real. In recoupment, the most a homeowner can receive is a cancellation of the future liability under the debt. To illustrate, *see* case cited *infra* note 32, regarding Edna Robinson, an older woman who asserted the right of rescission as a claim in recoupment in response to a foreclosure action. The rescission calculation revealed that she had already paid the lender several thousand dollars more than she owed. She was not able to collect one dollar of that overpayment as a claim in recoupment. In contrast, if she could have expanded the three-year limitations period by asserting equitable tolling and therefore asserted an affirmative rescission claim, she could have recovered those thousands of dollars from the lender, in addition to canceling the mortgage and any future liability under the note.

[27/] Brief on Appeal of Industry *Amici* at 7-12, *In re Botelho*, 195 B.R. (continued...)

hyperbolic rhetoric used in the wake of the *Rodash* decision, where industry concern quickly turned to alarm and then to panic because of the use of just such rhetoric. There is not a scintilla of evidence to support the industry's contention that permitting rescission in recoupment will trigger mass rescissions by homeowners in foreclosure.[28/]

The suggestion that a decision for the Beaches will lead to strategic defaulting by homeowners is, perhaps, the most implausible hyperbole of all.[29/] The industry cannot seriously contend that a decision for the Beaches would cause massive numbers of homeowners--who are not now in arrears on their mortgages--to risk their good credit, their good reputations, and the very roof over their heads by deliberately putting themselves into foreclosure in order to avail themselves of rescission in recoupment.

As the courts have frequently recognized, homeowners do not benefit from sitting on their rights; lenders do. These courts have concluded that construing the three-year limit as an absolute bar would allow lenders to violate their borrowers' rights to accurate disclosures about the cost of their credit, and then avoid liability under TILA by waiting three years to enforce their claims. While this behavior would certainly benefit the lender, who would be free to foreclose without concern for TILA liability, the homeowner is better served if s/he discovers a TILA violation during the

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[27/](...continued)
558 (Bankr. D. Mass. 1996), *appeal docketed, Citicorp Mortgage Inc. v. Botelho*, (1st Cir. May 7, 1997) (No. 97-1535) (App. 2).

[28/] As Ocwen's Br. in Opp. to Pet. for Cert. at 16 concedes, ". . . the percentage of loans in default is small, and the percentage of defaulting borrowers who raise truth-in-lending rescission rights is even smaller.."

[29/] *Beach*, 692 So.2d at 151-52 (Fla. 1997).

three-year period and can file an affirmative lawsuit against the lender.[30/]

The industry *amici* are not the only ones impacted by the availability of the extended right to rescind. It is homeowners, the very individuals for whose benefit the statutory right of rescission was created, who will suffer devastating effects if the right of rescission is curtailed. These homeowners will be impacted, not in billions of dollars, and not as an industry, but *one home at a time*. All homeowners[31/] who have struggled to maintain their mortgage payments will lose their right to assert rescission in recoupment should circumstances force them into default. Surely this was not the intended result when Congress created special rights and remedies for homeowners facing foreclosure and permitted the assertion of rescission as a claim in recoupment.

Many older, low income homeowners scrape and borrow to avoid default on loans that should never have been made.[32/]

[30/] A consumer who asserts an affirmative claim for rescission within the three-year period can not only void the lender's security interest and cancel future debt, but can also recover affirmatively from lender: any amounts paid in excess of the rescission amount and statutory damages. Such a consumer could have an affirmative recovery against a lender where the settlement costs (which are deducted from principal owing to the lender) comprise a large percentage of the loan amount.

[31/] The unavailability of rescission in recoupment will affect all homeowners, including those who have been victimized by unscrupulous lenders and who are most likely to fall into default and face foreclosure. It would be incongruous if, in their efforts to responsibly pay on an unaffordable loan, they should manage to last beyond three years and thereby jeopardize their right to rescind.

[32/] *See, e.g., Robinson v. First Gov't Mortgage & Investors Corp*, RP
(continued...)

The industry has suggested that these borrowers, whom Congress clearly intended to protect, be penalized for not defaulting on their loans earlier. That is an untenable position, and one which is without support in the Truth in Lending Act Amendments.

II. THE 1995 AMENDMENTS TO TILA RECOGNIZE A HOMEOWNER'S RIGHT TO ASSERT RESCISSION AS A CLAIM IN RECOUPMENT.

The industry has contended that the 1995 amendments to TILA settled the question of whether a homeowner can rescind in recoupment in response to an action by the lender to foreclose. We agree. However, a careful examination of the language of the 1995 Amendments to TILA and the legislative process leading to their enactment reveals that the Amendments settled the question in a manner quite opposite from the position of the industry.

A. The Absolute Limitation Language Sought By The Industry Failed To Survive The Legislative Process.

The bill which passed Congress in September 1995 was the last of a series of bills proposed in Congress in 1995 to amend the Truth in Lending Act. At least four separate

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[32/](...continued)
No. 1209-95 (D.C. Super. Ct., March 7, 1995)(Complaint on file at AARP). Mrs. Robinson, an elderly, retired homeowner, was victimized by a lender who saddled her with an unaffordable loan. She was able to make mortgage payments for several years, only after re-entering the workplace with a part-time job. Her age and disabilities ultimately forced her into retirement and into default on her mortgage after four years. She rescinded her mortgage as a claim in recoupment. The lawsuit was ultimately settled and Mrs. Robinson retained her home.

precursor bills were introduced by Members of the 104th Congress prior to the enactment of the Truth in Lending Act Amendments of 1995.[33/] Each of these bills proposed virtually identical language creating an absolute three-year bar on TILA's right of rescission.[34/] None of the bills containing this absolute bar language survived.

The following language appeared in H.R. 1858 as originally introduced:

> **SEC. 111. LIMITATION ON RESCISSION PERIOD.**
>
> Section 125(f) of the Truth in Lending Act (15 U.S.C. § 1635(f)) is amended by adding at the end the following sentences:
>
> The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of the three-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of

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[33/] The first bill was introduced on March 9, 1995 by Representative McCollum. H.R. 1184, 104th Cong. (1995). On March 30, 1995, broad regulatory relief bills were introduced in the House and Senate by Representative Bereuter and by Senators Shelby and Mack. H.R. 1362, S. 650, 104 Cong. (1995). On June 15, 1995, H.R. 1858 104th Cong. was introduced by Representative Leach.

[34/] H.R. 1184 contained language in Section 7, Limitation on Rescission Period and H.R. 1362 contained language in Section 111 which is identical to H.R. 1858, Section 113, quoted above. S. 650 similarly provided in Section 117, Limitation on Rescission, "no consumer may assert rescission affirmatively or as a defense" after 3 years and preempted "any State law that is inconsistent with any provision of this subsection." (*See* App. 3).

> credit, except as otherwise provided in the preceding sentence. This subsection shall supercede any State law which is inconsistent with this subsection.

H.R. 1858, 104th Cong. § 113 (1995).

While this provision was introduced at the behest of and with the strong backing of the mortgage lending industry,[35/] this absolute bar did not receive sufficient Congressional support to survive the legislative process. In the mark-up of the proposed legislation, the above-quoted language was deleted entirely.[36/] The 1995 Amendments to TILA were ultimately passed without amending 15 U.S.C. § 1635(f) in any way,[37/] and thus expressed a Congressional decision not to disturb the precedent set by *Dawe* and its progeny.

In June 1995 the House Banking Committee marked up House Bill 1858. In this mark-up, not only was the above-quoted language deleted[38/] from the proposed legislation, but

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[35/] *See infra* note 15.

[36/] Compare Section 111 of H.R. 1858, as introduced on June 15, 1995 by Representative Leach (which contains language creating an absolute limitation on the right to rescind, quoted above) with subtitle A of Title I of H.R. 1858 as reported out of the House Committee on Banking and Financial Services on July 18, 1995 which no longer contains a provision amending 15 U.S.C. § 1635(f). *(See* App. 4).

[37/] Compare 15 U.S.C.S. § 1635(f) (Law Co-op 1993) (pre-1995 Amendments) *with* 15 U.S.C.S. 1635 (Law Co-op Suppl. 1997) (amending § 1635, but leaving § 1635(f) undisturbed.

[38/] *See Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1327 (7th Cir.1997), where the court was persuaded that more restrictive language from an earlier draft of a statutory amendment was evidence that Congress had been aware of the discord on the issue and

(continued...)

a new section was added creating special protections for homeowners in foreclosure.[39/] In September 1995, shortly before enacting the 1995 TILA Amendments, Congress struck a compromise on the long term viability of rescission rights by adding a provision--15 U.S.C. § 1635(i)(3)--expressly permitting borrowers in foreclosure to raise rescission as a claim in recoupment after three years:

> **§1635. Right of rescission as to certain transactions. . . . (i) Rescission rights in foreclosure.** . . .(3) Right of recoupment under State law. Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.[40/]

The legislation adopting this compromise language was passed by voice vote in the House on September 27, 1995,[41/] and by voice vote in the Senate on the following day. 141 Cong. Rec. S14568 (daily ed. Sept. 27, 1995). This legislation, which is known as the Truth in Lending Act

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[38/](...continued)
had considered and rejected the proposed language.

[39/] The amendments to TILA also granted retroactive immunity for a whole host of disclosure violations and drastically increased the numerical tolerances for errors in disclosing the finance charge. The section adding protections for homeowners in foreclosure reinstated liability for several categories of the otherwise forgiven errors and set a lower tolerance of $35 for homeowners in foreclosure. *See* sources cited *supra* note 21 and accompanying text (summary of legislative changes made by the 1995 Amendments).

[40/] The Truth in Lending Act Amendments of 1995, H.R. 2399, 104th Cong. (1995) (sponsored by Rep. Bill McCollum) as enacted in Pub. L. No. 104-29, 109 Stat. 271, 275-76 (codified in 15 U.S.C. § 1635 (1995)).

[41/] 141 Cong. Rec. H9513 (daily ed. Sept. 27, 1995).

Amendments of 1995, was signed into law by President Clinton on September 30, 1995. Pub. L. No. 104-29, 109 Stat. 271, 275-76 (codified at 15 U.S.C. § 1635(i) (1995); 141 Cong. Rec. H1185 (daily ed. Sept. 30, 1995). The industry cannot now engineer the judicial creation of an absolute three-year limit on the right to rescind which Congress made a clear and deliberate decision not to adopt.[42/]

B. The Plain Language of Subsection 1635(i)(3) Makes Clear that Rescission Rights Are Available to Homeowners in Foreclosure Where Raised as a Claim in Recoupment.

The inclusion of the provision allowing rescission in recoupment makes perfect sense. Subsections 1635(i)(1) & (2) plainly and simply state that borrowers in foreclosure may use

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[42/] There is no legislative history on Sections 108-114 (including the provision on rescission rights in foreclosure) of the 1995 Amendments as passed in September 1995. Therefore, Ocwen cannot now rely on comments by members of Congress in support of language that simply did not appear in the final legislation. (Ocwen's Opp. to Pet. for Cert. at 25-26). *See Heintz v. Jenkins*, 514 U.S. 291 (1995), where Heintz sought to rely on a statement by Congressman Annunzio that, despite Congress' having deleted an exemption for attorneys from the Fair Debt Collection Practices Act when amending the statute, a limited exemption for litigation activities would still be implied into the amended statute. "For one thing, the plain language of the Act itself says nothing about retaining the exemption in respect to litigation. They proposed alternative language designed to keep litigation activities outside the Act's scope, *but that language was not enacted.*" *Heintz*, 514 U.S. at 297-298 (citation omitted) (emphasis added). Similarly, the industry cannot rely on the comments of Senator Mack and Representative McCollum (both sponsors of the original language, creating an absolute limit on the right to rescind, quoted *supra* pp. 15-17) to support its position that Congress adopted an absolute limit on the right to rescind. Moreover, since Congress did not amend section 1635(f) in the 1995 Amendments, floor comments regarding this provision should not impact its construction in any way.

TILA rescission as a "sword" in the first three years. Other homeowners, whose rescission rights were not curtailed as a result of the 1995 Amendments, are able to rescind affirmatively within the first three years without being in foreclosure.[43/] In reviving the right of rescission with respect to certain disclosure violations, subsections 1635(i)(1) & (2) make clear that borrowers in foreclosure and borrowers whose rescission claims can be raised without being in foreclosure are subject to the same three-year limitation on affirmative claims.[44/] *See supra* notes 21-22.

The importance of the distinction between affirmative rescission and rescission in recoupment cannot be overstated.[45/] Subsection 1635(i)(3) cannot be used as a "sword," only as a "shield." When rescission is asserted as a claim in recoupment, a homeowner cannot recover damages or funds already paid to the lender, but can only diminish or extinguish future liability under a debt.[46/] The import of

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[43/] For example, a borrower who is unaware of his obligation to make a large balloon payment because the lender failed to disclose this balloon payment on the TILA disclosure can rescind affirmatively in the first three years without being in foreclosure. 15 U.S.C. §§ 1602(u), 1635.

[44/] A borrower in foreclosure whose TILA disclosure failed to include a $5,000 brokers fee in the finance charge or APR may file an affirmative action for rescission in the first three years.

[45/] The Florida Supreme Court's decision to deny rescission in recoupment to *all* homeowners after three years is driven, in part, by Florida's idiosyncratic recoupment doctrine. ***See Allie v. Ionata***, 503 So. 2d 1237 (Fla. 1987). ***See infra*** Section III. C.

[46/] Following a valid rescission in recoupment the homeowner offsets the amount left owing to the creditor with the amount of payments made on the loan and any fees charged to initially procure the loan. 15 U.S.C. § 1635(b). In many cases the rescinding homeowner will still

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subsection 1635(i)(3) is to *make clear* that the only way a borrower in foreclosure can assert a right of rescission beyond the statute of limitations is by raising a defensive claim in recoupment.

What is clear from the tracking of the history of these amendments is that the mortgage industry came to Congress seeking passage of a statute absolutely limiting the right of rescission. It is equally clear that the industry failed in this effort and is here seeking to have the legislative provision Congress refused to pass written into TILA.

As Senator Sarbanes stated on the Senate floor prior to passage of the 1995 Amendments:

> The bill before the Senate today improves significantly the measure passed by the House Banking Committee. *Under the original House Bill, consumers would have lost the right of rescission for a whole class of loans* even if the most egregious violations of the Truth in Lending Act were committed. The bill before the Senate preserves that vital consumer protection.

141 Cong. Rec. S14567 (daily ed. Sept. 28, 1995, remarks of Senator Sarbanes) (emphasis added).

[46/](...continued)
owe a sum *which must be repaid to the lender*. In others, where the homeowner's payments and fees have exceeded the amount owing to the lender, the homeowner will be able to extinguish future liability but will not be reimbursed for excess payments.

III. THE *BEACH* COURT'S ANALYSIS CONFLICTS WITH FEDERAL RECOUPMENT DOCTRINE AND DISREGARDS SUBSECTION 1635(i)(3).

The Florida Supreme Court in *Beach* determined that a homeowner in Florida could not assert the right to rescind a mortgage loan as a claim in recoupment after the expiration of three years. In so doing, the court purported to ground its decision in Florida law: "[W]e hold that under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f)." 692 So.2d at 153. In fact, the court rested its analysis upon an incorrect interpretation of federal law.

A. Federal Recoupment Doctrine Favors Defensive Claims in Recoupment.

The *Beach* decision cannot be reconciled with prior Supreme Court pronouncements on federal recoupment doctrine. In *Bull v. United States*, the Court determined that recoupment is always available as a defense as long as the main claim is timely. 295 U.S. 247, 262 (1935).

> Recoupment is in the nature of a defense arising out of some features of the transaction upon which the defendant's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.

295 U.S. at 262.

The Court further elaborated on this doctrine in *United States v. Western Pacific Railroad*, determining that only the "clearest congressional language" would allow a court to deprive a party of the ability to raise a defensive claim in recoupment. 352 U.S. 59, 71 (1956). The Court further stated:

> We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without benefit of all the applicable law. If this litigation is not stale, then no issue in it can be deemed stale.

352 U.S. at 72.

The *Western Pacific* Court rests its analysis on a concept of fundamental fairness which is equally applicable here--if the claim of one party is viable and may be raised affirmatively, the defenses of another party relating to that claim must, in fairness, be permitted by way of recoupment.[47]

A homeowner's ability to rescind in recoupment is directly related to and limited by the lender's right to foreclose throughout the life of the mortgage.[48] Rescission is therefore properly raised in recoupment in response to such an action. A valid rescission voids the lender's security interest in the borrower's home. Since rescission deprives the lender of the legal authority to foreclose, federal recoupment doctrine

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[47] Contrary to the exaggerated assertions of Ocwen and the industry, the value of the borrower's rescission claim decreases significantly in the latter years of the mortgage term. For example, in most states, a rescinding borrower with a 30 year fixed rate mortgage who is in foreclosure after having made 345 of 360 payments on the mortgage would only be relieved of the obligation of paying the final 15 payments. This homeowner would not be able to recover interest and fees paid to the lender in excess of principal.

[48] The *Beach* court's premise that borrowers have "full control over . . . [the lender's] . . . 'ability to foreclose on its security interest in the residence'" is simply unsupportable. *Beach*, 692 So.2d at 152. In enacting §1635(i) Congress implicitly recognized that homeowners in foreclosure are vulnerable, financially at risk, and deserving of special protections. They are not "in control."

recognizes that it would be fundamentally unfair to allow a lender to foreclose beyond three years while denying the homeowner the corresponding right to assert a valid claim of rescission in defense to that action.

In *Reiter v. Cooper*, this Court expansively interpreted the federal recoupment doctrine expressed in *Western Pacific* as, "not just a narrow holding based on the United States setoff statute, but a general principle of recoupment applicable in other contexts." 507 U.S. 258, 264 (1993). Moreover, the Court referred favorably, *Id.*, to a Fifth Circuit decision which refused to deny recoupment in the face of statutory language that "discharged . . . all liability" if a lawsuit was not initiated within one year. *Distribution Servs., Ltd. v. Eddie Parker Interests, Inc.*, 897 F.2d 811 (5th Cir. 1990). The Fifth Circuit was unpersuaded by the argument that, "the recoupment action . . . inheres in the [statute and therefore] the basis for liability is also extinguished once the limitations period expires." *Id.* at 813. Similarly, the Court should be unpersuaded here.

B. The Florida Court's Failure to Consider Subsection 1635(i)(3) Was a Fatal Error.

In reaching its decision, the Florida Supreme Court failed to address the very provision which specifically applies to homeowners in foreclosure and permits the raising of claims for rescission in recoupment. The court simply states, "the new provision does not relate to this case's factual situation." *Beach*, 692 So. 2d at 151. This conclusion is perplexing. Subsection 1635(i) is entitled, "Rescission rights in foreclosure." The Beaches were in foreclosure and were asserting that they had rescission rights. Nothing could be more clear than that subsection 1635(i) was intended to apply to them. The legislative process leading up to the enactment of this subsection unequivocally supports the Beaches' assertion of their rescission claim. Section 1635(i)(3) is clearly before this Court on the facts presented here.

To the extent the Florida court relied on House Committee Report language in reaching any conclusions about the applicability of subsection 1635(i) to the Beaches' situation, its reliance was misplaced. *See Beach*, 692 So.2d at 149. As discussed in Section II, *supra*, the House Committee Report relied on by Ocwen preceded by several months the inclusion of subsection (i)(3) (rescission in recoupment) in the 1995 Amendments. At the time the Committee Report was written in July 1995, subsection 1635(i) contained only subsections (1) & (2) and, therefore, applied only to homeowners whose disclosure violations were "forgiven" and were being "revived" in foreclosure. (*See* App. 5). However, in September 1995, a new subsection 1635(i)(3) was added which was directly applicable to the Beaches in that it codified *Dawe* for all homeowners in foreclosure. Since the *Beach* court did not consider the application of subsection 1635(i)(3) to the Beaches' claim for rescission, its reasoning is fatally flawed.

C. The *Beach* Court's Substitution of Florida Law Improperly Restricted the Federal Right of Rescission.

Concluding that subsection 1635(i)(3) was inapplicable, the Florida Supreme Court improperly substituted its own judgment for that of Congress in determining the remedial right of rescission to be unavailable to the Beaches. The court's decision to deny rescission in recoupment to *all* homeowners after three years was driven, in part, by Florida's idiosyncratic recoupment doctrine. Under Florida law, the bringing of a timely claim not only revives an opponent's claims in recoupment to the extent of defending against that claim, but allows that party to obtain affirmative relief when raising a time-barred claim in recoupment.[49]

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[49] Recoupment is defined as, [t]he right of a defendant,

(continued...)

Allie v. Ionata, 503 So. 2d 1237 (Fla. 1987). Contrary to *Beach*, Florida recoupment doctrine diverges rather dramatically from federal recoupment doctrine and cannot be relied upon to supplant or supercede a federal claim. *Testa v. Katt*, 330 U.S. 386 (1947).

Having improperly superimposed Florida recoupment doctrine on its analysis of a federal claim, the *Beach* court compounded its error by conducting an equitable analysis of rescission. [50/] This led the court to conclude that rescission is a penalty, *Beach* at 153, a conclusion in direct conflict with Congress' determination that TILA statutory damages (§ 1640(e)), not the right of rescission, function as a penalty.[51/] S. Rep. No. 96-368, at 32-33 (1980) *reprinted in* 1980 U.S.C.C.A.N. 236, 267-68. "[T]he remedy of

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[49/](...continued)

> in the same action, to cut down the plaintiff's demand either because the plaintiff has not complied with some cross obligation of the contract on which he sues or because he has violated some duty which the law imposes on him in the making or performance of that contract. Ballantine's Law Dictionary 1070 (3d ed. 1969).

Coxson v. Commonwealth Mortgage Co., 43 F.3d 189, 193 (5th Cir. 1995) (alteration in original) (citation omitted).

[50/] Moreover, the court's purported analysis of the equities in this case led it to an inexplicable and unsupportable conclusion that rescission would be inequitable in *all* cases.

[51/] *See also F.D.I.C. v. Hughes Dev. Co.*, 684 F. Supp. 616, 621-23 (D. Minn. 1988); *F.D.I.C. v. Monterrey, Inc.*, 847 F. Supp. 997, 1004, n.9 (D.P.R. 1994) in which the courts concluded that statutory damages are a penalty and could not be assessed against the FDIC, but rescission was not punitive and was therefore available to defend against the FDIC's claim. In *James v. Home Const. Co.*, 621 F.2d 727, 729-730 (5th Cir. 1980), the court concluded that TILA rescission is not a penalty and can therefore survive the death of the borrower.

rescission serves an equitable function. It does not serve a punitive one. Congress established punitive remedies in the TILA, in the form of statutory damages. . . ." *Thorp Loan and Thrift Co. v. Buckles*, 189 B.R. 752, 765 (Bankr. D. Minn. 1995).[52/]

The decision in *Beach* reveals the court's fundamental misapprehension of Congress' determination to create uniformity in credit practices through the self-enforcement scheme of TILA. Despite Congress' choice of rescission as the tool to insure compliance, the *Beach* court used Florida law to conclude otherwise, thereby improperly restricting access to this important federal claim. *Testa v. Katt*, 330 U.S. 386 (1947).

IV. RECISSION IN RECOUPMENT IS NECESSARY TO COMBAT WELL RECOGNIZED ABUSES IN THE HOME EQUITY LENDING MARKET.

In passing the Home Ownership and Equity Protection Act of 1994, Congress recognized the need to curtail abusive and predatory lending practices that have continued unchecked in some home equity lending markets, particularly to low income and older homeowners.[53/] Ocwen fails to address these

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[52/] The *Beach* court labors under the misconception that a borrower's extended right to rescind is somehow premised on the lender's bad faith. "This three-year extension [of the right of rescission], section 1635(f), *based on the lenders' bad faith* in not disclosing material terms, is the key provision at issue in this case." *Beach*, 692 So.2d at 147 n. 2. (emphasis added).

[53/]

> [HOEPA] prohibits unfair and deceptive practices which have robbed many Americans of their most valuable asset, their home. It also requires better disclosure of the cost and terms of high cost mortgages. This legislation should put an end to the

(continued...)

homeowners, to whom Congress accorded special protections only a few years ago by enacting HOEPA. Even though Congress *prohibited* certain loan provisions made in connection with a high cost mortgage, Ocwen would have this Court believe that a homeowner who was victimized by an illegal high cost mortgage should be unable to raise the *prohibited* terms in defense to a foreclosure after three years as a claim for rescission in recoupment.[54/]

One of the more egregious (and prohibited) abuses perpetrated by predatory, high cost lenders is to make short-term mortgage loans with a final balloon payment. For example, on a $25,000 mortgage loan, charging a 10% broker's fee and 15% interest, a lender might assess monthly payments of only $250.[55/] When the loan comes due in four

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[53/](...continued)

> ability of unscrupulous lenders to prey on senior citizens and other vulnerable homeowners. . . .

140 Cong. Rec. H6782, H6787 (daily ed. Aug. 4, 1994) (remarks of Rep. Kanjorski).

[54/] HOEPA prohibited certain loan terms, such as balloon payments on mortgages of less than 5 years duration, for "high cost" loans. Loans are considered to be "high cost" and therefore subject to additional protections and prohibitions under TILA if the "points and fees" on the loan exceed 8% of the total loan amount or the APR on the loan exceeds the yield on a comparable Treasury security by more than 10 percentage points. The remedy selected by Congress to enforce these prohibitions was the right of rescission. 15 U.S.C. §§ 1602(aa), 1639 (1994). However, no special limit on the right of rescission was created for HOEPA loans. Like all home secured loans, HOEPA loans are subject to the three-year limit in subsection 1635(f) (1994).

[55/] A $250 monthly payment on this loan represents a charge that is less than the monthly interest owing on the loan. This creates additional indebtedness that is added to the balance owing at the end of the loan term. When the monthly payment is less than the interest accruing on

(continued...)

years, the homeowner would owe a balloon payment of $29,326.81, reflecting the entire principal of $25,000 plus the $4,326.81 in unpaid interest that accrued through negative amortization.

Under Ocwen's analysis, if this homeowner regularly made monthly payments for the full four year mortgage term but defaulted when the balloon came due, she would be denied the right to rescind the mortgage in recoupment. This result would nullify HOEPA's prohibitions on balloon mortgages and negatively amortizing loans.[56/] Such an analysis turns HOEPA on its head, encouraging abusive lenders to devise mortgage loans with affordable monthly payments and a large, negatively amortized balloon payment due at the end of a greater than three-year term.

Congress determined that the tool of choice to enforce the additional disclosure requirements of HOEPA and to deter prohibited terms in high cost loans was the right of rescission. 15 U.S.C. § 1639. The limitation period for the right of rescission in a HOEPA loan is identical to the limitation on rescission for all loans. It is therefore, implausible that Congress intended to deny the exercise of that tool to a homeowner whom HOEPA was clearly designed to protect.

Every day AARP is presented with elderly, unsophisticated homeowners whose TILA rights have been violated. While some of these lenders are regularly engaged in such egregious and pervasive practices as loan churning, failing to provide disclosures and extending credit without any reasonable expectation that the borrower will be able to repay,

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[55/](...continued)

the loan each month, the loan is one which is negatively amortizing.

[56/] HOEPA prohibits balloons with a term of less than five years on high cost mortgages. 15 U.S.C. §§ 1602, 1639.

their loan transactions are not necessarily subject to HOEPA. Moreover, many more subtle abuses occur in the lending process, for which TILA's strict liability serves as a check. The right to assert a claim of rescission in recoupment to defend against a foreclosure action is critical to TILA's statutory purpose to provide meaningful disclosure of credit terms and to balance the scales between lenders and consumers.

CONCLUSION

For the foregoing reasons, AARP respectfully requests that the judgment of the Florida Supreme Court be reversed. AARP urges this Court to rule that the statutory right of rescission provided by TILA is revived for a borrower in foreclosure and can be asserted defensively as a claim in recoupment beyond the three-year limit.

Respectfully submitted,

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November 26, 1997

Appendix

APPENDICES

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2: Brief on Appeal of American Bankers Ass'n *et al Amici Curiae* at 7-12, *In re Botelho,* 195 B.R. 558 (Bankr. D. Mass. 1996), *appeal docketed, Citicorp Mortgage Inc. v. Botelho*, (1st Cir. May 7, 1997) (No. 87-1535) 3a

3: H.R. 1184, §7, 104th Cong (1995); H.R. 1362, §111 104th Cong. (1995); H.R. 1858,§113 104th Cong. (1995); S. 650 § 117 104th Cong.(1995) . . 11a

4: H.R. 1858,§111 104th Cong. (1995) *as introduced, on June 15, 1995*, and H.R. 1858, Title I, subtitle A (bill as reported out of committee) 19a

5: *Financial Institutions Regulatory Relief Act of 1995*, House Rept. No, 104-193, § 133 . . . . . 27a

APPENDIX 1

Congress of the United States
House of Representatives
Washington, DC 20515-0005

How Can A $12 Error Cost $30,000?

March 8, 1995

Dear Colleague:

Extraordinary penalties for inconsequential errors threaten the mortgage industry. As a result, over 50 class action lawsuits have been filed since March '94 which were filed in response to technical problems with the Truth In Lending Act (TILA).

The TILA requires that lenders reveal credit terms to borrowers in a manner that allows them to objectively compare different credit products. Under TILA, refinance and second mortgage loans can be rescinded for up to three years for minor discrepancies in the disclosure statement of as little as $10. On a typical $120,000 refinance loan at 8% with $3,000 in closing costs, rescission in the third year for a $12 technical disclosure error could result in a penalty to the lender of more than $30,000.

These problems recently surfaced as a result of the *Rodash v. AIB Mortgage* decision in the 11th Circuit court. In *Rodash,* the court held that intangible taxes and courier fees imposed by a third party settlement agent were improperly disclosed to the "amount financed" rather than as part of the "finance charge." In other words, these items were in the wrong column. In accordance with the law, the court ordered the rescission of a mortgage loan nearly one year after the closing. Furthermore, the lender was required to return all

closing costs (including those paid to third parties) and interest paid by the borrower.

The mortgage lending industry faces dire consequences if loans are rescinded in significant numbers. Since 1991, 11.8 million loans totalling $1.3 trillion have been refinanced. All of these refinance loans are potentially subject to rescission. Estimated interest and closing costs, which is the potential cost of rescission of these loans, adds up to approximately $217 billion.

The exposure from this litigation potentially could impair the safety and soundness of all types of lenders---thrifts, banks and mortgage bankers. In addition, this litigation will increase the cost of buying a home.

Today, I am introducing the "Truth In Lending Act Amendments of 1995," which provides the technical changes necessary to clarify the treatment of fees and charges and expand the tolerance for finance charge errors. I invite you to co-sponsor this critical piece of legislation. To do so, please call Tom Rosenkoetter on my staff at 5-2176.

Sincerely,

/s/ Bill McCollum
BILL McCOLLUM
Member of Congress

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 97-1535

CITICORP MORTGAGE, INC.,
Appellant,

v.

DOROTHY BOTELHO,
Appellee.

BRIEF OF *AMICI CURIAE*
AMERICAN BANKERS ASSOCIATION,
AMERICA'S COMMUNITY BANKERS,
CONSUMER BANKERS ASSOCIATION,
AMERICAN FINANCIAL SERVICES ASSOCIATION,
CONSUMER MORTGAGE COALITION,
MASSACHUSETTS BANKERS ASSOCIATION,
MORTGAGE BANKERS ASSOCIATION OF AMERICA,
FEDERAL HOME LOAN MORTGAGE CORPORATION
AND FEDERAL NATIONAL MORTGAGE ASSOCIATION
URGING REVERSAL OF THE DECISION BELOW

Peter E. Gelhaar
(BBO No. 188310)
DONNELLY, CONROY
& GELHAAR, LLP
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(617) 542-7400

* * * *

[7] or other holder of the mortgage in this example is tremendous. Rather than keeping the interest paid and recovering the remaining principal, a total of $160,212.84, the lender receives a tender of only $25,170.10 — a loss of 85%.

The real life example in the case at bar is also illustrative. Dorothy Botelho suggested in her Bankruptcy Court filings that her $59,100 loan be credited with over $32,000 because of the rescission. The principal balance which Botelho claimed she owed Citicorp would be $22,729.17. As part of her bankruptcy plan, Botelho proposes only to tender back, on a five-year payment plan, $6,750 of that principal. Rather than ending up with over $90,000, representing the principal balance and previously-paid interest, if the decision below is affirmed and Botelho's proposal plan approved, Citicorp would be left with less than $10,000.

The potential for losses on any market wide measure is also great. *Amici* know of no reliable estimate of the magnitude of TILA violations that might render older loans rescindable, but the danger is real. In Congressional testimony, the Chairman of the Federal Deposit Insurance Corporation stated that "the complexity of Regulation Z [that implements TILA] is such that the FDIC cited more than 2,700 of the 3,500 institutions we examined in 1994 for at least one violation." *Hearing on Senate Bill 650 before Subcommittee on Financial Institutions and Regulatory Relief of the Senate Committee on Banking, Housing and Urban Affairs*, 104th Cong., 1st Sess. (May 2, 1995).

Technical violations of TILA are not unusual; truth in lending disclosures are highly detailed. Lenders strive for one hundred per cent accuracy in compliance, but in such a large

industry and with such a difficult statute to work with, errors do occur. [8] Unfortunately, only a small tolerance is permitted for certain errors in the numerical aspects of the disclosure process and no tolerance is allowed concerning certain mistakes in the form or content of disclosures given. *See* 15 U.S.C. §1635(i)(1)(use of wrong form of disclosure), §1635(i)(2)(disclosure error of only $35.00 renders loan subject to rescission in foreclosure). The loan by Citicorp to Botelho is a case in point. The error Botelho alleges permits her to rescind her $5^1/_2$ year old debt was Citicorp's use of the wrong form for disclosures. There was nothing inaccurate about the numerical disclosures that were made, and no suggestion by Botelho or her counsel at any time in this case that she was misled or misunderstood her commitment. Rather, the objective of her suit is to use a technical mistake to escape her agreement to repay a loan.

Using estimates only, *amici* believe that the value of older mortgage loans that, at any one time, are newly subject to rescission in foreclosure could exceed $1 billion.[4] If even

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[4] In order to be at risk for rescission beyond the three year expiration of the rescission right, the loan would have to (i) be more than three years old, (ii) be in foreclosure and (iii) be rescindable under TILA, because it is a qualifying loan (a non-purchase money loan, such as a refinancing) and contains one of the relevant TILA errors that would allow rescission under 15 U.S.C. § 1635. At any one time, if *Botelho* is affirmed, *amici* estimate that $1,000,000 in loans in foreclosure might newly be subject to rescission.

The calculation of this estimate is straightforward. According to recent figures, total single family mortgage debt currently is in excess of $3.8 trillion. *Inside Mortgage Finance*, at 4 (Nov. 1, 1996). Of that, about $1.4 trillion in loans was more than three years old. (*Inside Mortgage Finance*, at 15 (February 2, 1996)($2.4 trillion in loans originated during period 1993-1995). One industry estimate puts at least 0.67% of all loans in foreclosure at one time. *Inside Mortgage Finance*, at 12 (Sept. 13, 1996).

only [9] a small percentage of those with a rescindable loan will attempt to rescind in foreclosure, the industry impact could run into the hundreds of millions of dollars each year.

In addition to hard losses, the *Botelho* decision, if affirmed, also could have a negative effect on the sale of loans in the secondary mortgage market. If mortgages become less certain, interest rates will have to rise to make up for the higher collection risks. Ultimately, the consumer could pay in the form of higher interest rates on home loans.

2. The Ability To Rescind Loans Many Years After The Closing Is Likely To Encourage Litigation And Cause Fraud And Abuse.

A second result of the ruling below is the risk that in creating a right in equitable recoupment to exercise an equitable rescission, the Bankruptcy Court may have touched off a flood of litigation. Having obtained a favorable ruling at the trial court level, there is substantial evidence that consumers and their advocates already are using the *Botelho* case actively to challenge foreclosures in the federal courts of Massachusetts. This litigation, if it fully develops, will

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That yields an estimated total of loans in foreclosure of about $9.68 billion. Although there is no way to determine how many qualifying loans have TILA errors that would allow rescission, one group of consumer lawyers believes such violation to be common enough that "[a]dvocates representing clients in [connection with foreclosure] who do not evaluate the case for the possibility of Truth in Lending rescission are flirting with malpractice." K. Keest and G. Klein, *Truth in Lending*, 3d ed., § 1.1.2 at 33 (Nat'l Cons. Law Ctr. 1995 & 1996 Supp.). If one presumes that only 10% of all loans in foreclosure are subject to TILA rescission (which generally applies only to refinancings and requires the existence of a disclosure error sufficient to allow rescission) it would mean that approximately $1,000,000,000 in loans in foreclosure at any one time may potentially be subject to rescission due to the principles articulated in *Botelho*.

plunge the Bankruptcy and District Courts even further into traditional state law matters concerning mortgages and foreclosures. This Court should stem the tide by reversing the lower court.

Botelho's counsel, during the argument in the District Court, expressed the view that the *Botelho* case is not likely to cause substantial additional litigation. *Amici* respectfully disagrees, and point to a number of pieces of evidence that this case on appeal will have that effect. *Amici* are aware of at least three lawsuits, relying on or citing *Botelho* or its principles, pending or recently pending in lower federal courts in this District alone. The example of Florida also is instructive. As noted above, the Florida Supreme Court recently held that TILA rescission claims may not be raised in response to a foreclosure if the statute of [10] repose period has run. *Beach* v. *Great Western Bank*, 692 So. 2d 146 (Fla. 1997). That decision disposed of not only the dispute between Great Western and the Beaches, but similar claims made in three additional lawsuits that already were in the appellate courts of Florida. *Kasket* v. *Chase Manhattan Mortgage Corp.*, 1997 Fla. App. LEXIS 5627 (Fla. App. 4th Dist. May 21, 1997); *Key Savings Bank, F.S.B.* v. *Dean*, 1997 Fla. App LEXIS 5628 (Fla. App. 4th Dist. May 21, 1997); *Great Western Bank* v. *Shoemaker*, 1997 Fla. App. LEXIS 5382 (Fla. App. 2d Dist. May 16, 1997). *Amici* are generally aware of some two dozen cases in the trial courts of Florida in the last several years in which late rescissions were attempted. It would not be surprising to see the same phenomenon repeated in Massachusetts federal and state courts, as well as in courts across the country.

Fraud and abuse may well be a feature of many of such suits. *Beach* v. *Great Western Bank*, 670 So. 2d 986, 991 (Fla. App. 4th Dist. 1996) (recognizing danger that borrowers

unrestricted by the repose deadline can default strategically).[5] The case of *Signet Mortgage Corp.* v. *Tucker*, C.A. No. 96-10932-REK (D. Mass.), recently before Judge Keeton, provides what *amici* believe is a chilling example of how *Botelho* principles are likely to be [11] misused. In the *Tucker* case, the borrower had obtained a loan in early 1988 in the amount of $105,000, but subsequently had been chronically late on payments, missed many months, and was in and out of bankruptcy three times. *See generally Deposition of Donald Keith Tucker* (Feb. 21, 1997).[6] In 1995, he approached a "mortgage counselor" for assistance. *Id.*, at 78-79, 85-86. According to the testimony in the case, upon review of the loan documents the counselor opined that

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[5] There is no merit in the Bankruptcy Court's contrary speculation that lenders act in bad faith and abuse the right to foreclose, waiting until after the repose deadline so as to avoid a rescission. *Botelho*, 195 B.R. at 566, citing *Dawe v. Merchants & Trust*, 683 P.2d at 801, and *Federal Deposit Insurance Corp. v. Ablin*, 177 Ill. App. 3d 390, 395, 532 N.E. 2d 379 (1988). The realities of modern mortgage banking make such abuse highly unlikely. Many mortgages are now "serviced" (i.e., payments collected, records kept, escrow accounts managed) under contracts which, within a range of some discretion, generally provide that foreclosure proceedings must be started within 3-9 months of default. *See Freddie Mac Single Family Seller/Servicer Guide*, Ch. 66-9; *Fannie Mae Single Family Servicing Guide*, Part VIII, § 102; *Federal Housing Administration Handbook*, 7.12(D). *See also Beach* v. *Great Western Bank*, 670 So. 2d at 990 ("[m]odern banking regulations make this [the prospect of lenders waiting out the three year period and then foreclosing] highly unlikely.") Moreover, the lost interest earned on sums tied up in a delinquent mortgage loan is incentive enough for any lender or servicer to foreclose in a reasonable time after default.

[6] The transcript of the Tucker deposition was filed in *Signet* v. *Tucker* with the District Court for the District of Massachusetts in connection with a Motion for Summary Judgment, attached to the Affidavit of Thomas M. Hefferon, Esq. (March 5, 1997).

TILA "had been broken" in his case, told him that he had a right to rescind the loan under certain circumstances, and advised him to stop paying on the loan, which he did. *Id.*, 79-80, 89, 97. She referred him to a Boston attorney (*id.*, at 86, 90), who, after the lender initiated foreclosure, purported to rescind the loan on the borrower's behalf. *Id.*, at 133. Rather than being able to foreclose on a defaulted borrower, the lender ended up in the federal courthouse.[7]

While a number of suits and counterclaims attempting late rescissions have been filed, *amici* are fearful of many more to come. At least one Massachusetts Continuing Legal Education ("MCLE") program for members of the bar has trumpeted *Botelho* as the centerpiece for a seminar. The seminar announcement invited attorneys to learn:

- How to avoid a mortgage, rendering the balance due an unsecured claim.
- How to require a lender to credit all payments on a mortgage to reduction of principal, effectively turning a traditional interest-bearing promissory note into an interest-free loan.
- How to raise federal [12] Truth-in-Lending Act violations as defenses to a foreclosure action, even though the statute of limitation for bringing such actions has expired.

See "Consumer Finance Regulation," advertising Jan. 28, 1997 MCLE Seminar (attached hereto as Exhibit A).

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[7] Judge Keeton ultimately granted Signet's summary judgment motion, which had sought judgment on the grounds that the borrower had no TILA rescission right at all because the loan was secured by rental property, not the borrower's residence. Final Judgment (March 12, 1997), *Signet v. Tucker*, C.A. No. 96-10932-REK (D. Mass.).

Comments by other attorneys suggest the possibility that a defensive rescission claim should be considered in response to every attempted foreclosure. *See Loan Rescinded For a $28 Charge Understatement*, 25 Massachusetts Lawyers Weekly 1911 (May 19, 1997) (quoting Edward K. O'Brien, Esq.: "between this case (*Mayo v. Key Financial Services, Inc.*, 424 Mass. 862, 678 N.E. 2d 1311 (1997) allowing for a rescission and a couple of other cases coming from the Bankruptcy Court in Massachusetts, any borrower faced with a foreclosure action owes it to him or herself to seek counsel familiar with recent rescission cases — regardless of how old the loan is."); K. Keest and G. Klein, *Truth in Lending* § 1.1.2 at 33 (rescission considered as defense to any foreclosure).

It is the nature of our adversary system that the *Botelho* decision is already being used, and may be used to an increasing degree, to defeat or hold up legitimate foreclosures on mortgages which were assumed valid for many years. Borrowers are even using it to default strategically. The consequences of an avalanche of individual cases, each prosecuted individually, would have a significant impact industry wide. That is the concern of *amici*, and one reason they appear here.

* * * *

APPENDIX 3

104TH CONGRESS
1ST SESSION

H. R. 1184

IN THE HOUSE OF REPRESENTATIVES

March 9, 1995

Mr. McCollum (for himself, Mr. Leach, Mrs. Roukema, Mr. Bereuter, Mr. Roth, Mr. Baker of Louisiana, Mr. Lazio of New York, Mr. Bachus, Mr. Castle, Mr. King, Mr. Royce, Mr. Weller, Mr. Ehrlich, Mr. Chrysler, Mr. Cremeans, Mr. Heineman, and Mr. LoBiondo) introduced the following bill, which was referred to the Committee on Banking and Financial Services

A BILL

To amend the Truth in Lending Act to clarify the intent of such Act and to reduce burdensome regulatory requirements on creditors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Truth in Lending Act Amendments of 1995".

* * *

SEC. 7. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following sentences: "The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of

the 3-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection''.

104TH CONGRESS
1ST SESSION

H. R. 1362

To reduce paperwork and additional regulatory burdens for depository institutions.

IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 1995

Mr. BEREUTER (for himself, Mr. LEACH, Mr. MCCOLLUM, Mrs. ROUKEMA, Mr. ROTH, Mr. BAKER of Louisiana, Mr. LAZIO of New York, Mr. BACHUS, Mr. ROYCE, Mr. WELLER, Mr. KING, Mr. BONO, Mr. EHRLICH, Mr. CHRYSLER, Mr. CREMEANS, Mr. WATTS of Oklahoma, Mrs. KELLY, Mr. BARRETT of Nebraska, Mr. ORTON, Mr. CASTLE, Mr. HEINEMAN, Mr. LATHAM, Mr. CHRISTENSEN, and Mr. FOX of Pennsylvania), introduced the following bill; which was referred to the Committee on Banking and Financial Services

A BILL

To reduce paperwork and additional regulatory burdens for depository institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Financial Institutions Regulatory Relief Act of 1995''.

* * *

SEC. 111. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following

sentences: ''The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of the three-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection.''.

104 H.R. 1858 printed in full format.

FULL TEXT OF BILLS

104TH CONGRESS; 1ST SESSION
IN THE HOUSE OF REPRESENTATIVES
AS INTRODUCED IN THE HOUSE

H. R. 1858

1995 H.R. 1858; 104 H.R. 1858

< =1 > Retrieve Bill Tracking Report

* * *

DATE OF INTRODUCTION: JUNE 15, 1995

DATE OF VERSION: JUNE 21, 1995 — VERSION: 1

SPONSOR(S):
Mr. LEACH introduced the following bill; which was referred to the Committee on Banking and Financial Services

TEXT:
* Be it enacted by the Senate and House of Representatives *
* of the United States of America in Congress assembled, *

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Financial Institutions Regulatory Relief Act of 1995''.

* * *

SEC. 111. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following sentences: ''The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action

in any State or Federal court after the earlier of the end of the 3-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection.''.

104TH CONGRESS
1ST SESSION

S. 650

To increase the amount of credit available to fuel local, regional, and national economic growth by reducing the regulatory burden imposed upon financial institutions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 30 (legislative day, MARCH 27), 1995

Mr. SHELBY (for himself, Mr. MACK, Mr. D'AMATO, Mr. BRYAN, Mr. BENNETT, Mr. FAIRCLOTH, Mr. BOND, Mr. GRAMM, and Mr. DOLE) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To increase the amount of credit available to fuel local, regional, and national economic growth by reducing the regulatory burden imposed upon financial institutions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Economic Growth and Regulatory Paperwork Reduction Act of 1995''.

* * *

SEC. 117. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended—

(1) by striking ''(f) An obligor's right of rescission'' and inserting the following:

''(f) LIMITATION ON RESCISSION PERIOD.—

''(1) IN GENERAL.—The right of rescission of an obligor'':

(2) by striking ''except that if (1) any agency'' and inserting the following: ''except that if—

''(A) any agency'';

(3) by striking ''transaction, (2) such agency'' and inserting the following: ''transaction;

''(B) such agency'';

(4) by striking ''section 125, and (3) the obligor's'' and inserting the following: ''this section; and

''(C) the obligor's''; and

(5) by adding at the end the following new paragraphs:

''(2) ACTIONS AFFECTED.—Except as otherwise provided in paragraph (1), the expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action brought under this title in any State or Federal court after the earlier of—

''(A) the expiration of the 3-year period beginning on the date on which the transaction is consummated; or

''(B) the date of the sale of the property securing the loan or other extension of credit.

''(3) PREEMPTION OF STATE LAW.—This subsection shall supersede any State law that is inconsistent with any provision of this subsection.''.

APPENDIX 4

104 H.R. 1858 printed in full format.

FULL TEXT OF BILLS

104TH CONGRESS; 1ST SESSION
IN THE HOUSE OF REPRESENTATIVES
AS INTRODUCED IN THE HOUSE

H. R. 1858

1995 H.R. 1858; 104 H.R. 1858

<=1> Retrieve Bill Tracking Report

DATE OF INTRODUCTION: JUNE 15, 1995

DATE OF VERSION: JUNE 21, 1995 — VERSION: 1

SPONSOR(S):
Mr. LEACH introduced the following bill; which was referred to the Committee on Banking and Financial Services

TEXT:
* Be it enacted by the Senate and House of Representatives *
* of the United States of America in Congress assembled, *

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Financial Institutions Regulatory Relief Act of 1995''.

* * *

SEC. 111. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following sentences: ''The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action

in any State or Federal court after the earlier of the end of the 3-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection.''

104 H.R. 1858 printed in FULL format.

FULL TEXT OF BILLS

104TH CONGRESS; 1ST SESSION
IN THE HOUSE OF REPRESENTATIVES
AS REPORTED IN THE HOUSE

H. R. 1858

1995 H.R. 1858; 104 H.R. 1858

<=1> Retrieve Bill Tracking Report

SYNOPSIS:
A BILL To reduce paperwork and additional regulatory burdens for depository institutions.

DATE OF INTRODUCTION: JUNE 15, 1995

DATE OF VERSION: JULY 19, 1995 — VERSION: 2

SPONSOR(S):
Mr. LEACH introduced the following bill; which was referred to the Committee on Banking and Financial Services

TEXT:

H. R. 1858

Report No. 104-193

A BILL

To reduce paperwork and additional regulatory burdens for depository institutions.

JULY 18, 1995

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

Union Calendar No. 98

104TH CONGRESS
1ST SESSION

H. R. 1858

Report No. 104-193

To reduce paperwork and additional regulatory burdens for depository institutions.

IN THE HOUSE OF REPRESENTATIVES

JUNE 15, 1995

Mr. LEACH introduced the following bill; which was referred to the Committee on Banking and Financial Services.

* * *

(b) CLERICAL AMENDMENT.—The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 138 the following new item:

''139. Certain limitations on liability.''.

SEC. 110. LIMITATION ON RESCISSION LIABILITY.

Section 125 of the Truth in Lending Act (15 U.S.C. 1635) is further amended by adding at the end the following new subsection:

''(h) LIMITATION ON RESCISSION.—AN OBLIGOR SHALL HAVE NO RESCISSION RIGHTS ARISING FROM THE FORM OF WRITTEN NOTICE USED BY THE CREDITOR TO INFORM THE OBLIGOR OF THE RIGHTS OF THE OBLIGOR UNDER THIS SECTION, IF THE CREDITOR PROVIDED THE OBLIGOR THE APPROPRIATE FORM OF WRITTEN NOTICE PUBLISHED AND ADOPTED BY THE BOARD, OR A

COMPARABLE WRITTEN NOTICE OF THE RIGHTS OF THE OBLIGOR, THAT WAS PROPERLY COMPLETED BY THE CREDITOR.''.

SEC. 111. CALCULATION OF DAMAGES.

Section 130(a)(2)(A) of the Truth in Lending Act (15 U.S.C. 1640 (a)(2)(A)) is amended—

(1) by striking ''or (ii)'' and inserting ''(ii)''; and

(2) by inserting before the semicolon at the end the following: '', or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $250 or greater than $2,500''.

SEC. 112. ASSIGNEE LIABILITY.

(a) VIOLATIONS APPARENT ON THE FACE OF TRANSACTION DOCUMENTS.—Section 131 of the Truth in Lending Act (15 U.S.C. 1641) is amended by adding at the end the following new subsection:

''(e) LIABILITY OF ASSIGNEE FOR CONSUMER CREDIT TRANSACTIONS SECURED BY REAL PROPERTY.—

''(1) IN GENERAL.—Except as otherwise specifically provided in this title, any civil action against a creditor for a violation of this title, and any proceeding under section 108 against a creditor, with respect to a consumer credit transaction secured by real property may be maintained against any assignee of such creditor only if—

''(A) the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement provided in connection with such transaction pursuant to this title; and

"(B) the assignment to the assignee was voluntary.

"(2) VIOLATION APPARENT ON THE FACE OF THE DISCLOSURE DESCRIBED.—For the purpose of this section, a violation is apparent on the face of the disclosure statement if—

"(A) the disclosure can be determined to be incomplete or inaccurate from the face of the disclosure statement, any itemization of the amount financed, or any other disclosure of disbursement; or

"(B) the disclosure statement does not use the terms or format required to be used by this title.".

(b) SERVICER NOT TREATED AS ASSIGNEE.—Section 131 of the Truth in Lending Act (15 U.S.C. 1641) is amended by inserting after subsection (e) (as added by subsection (a) of this section) the following new subsection:

"(f) TREATMENT OF SERVICER.—

"(1) IN GENERAL.—A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section unless the servicer is the owner of the obligation.

"(2) SERVICER NOT TREATED AS OWNER ON BASIS OF ASSIGNMENT FOR ADMINISTRATIVE CONVENIENCE.—A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the obligation. Upon written

request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.

"(3) SERVICER DEFINED.—For purposes of this subsection, the term 'servicer' has the same meaning as in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974.".

SEC. 113. RESCISSION RIGHTS IN FORECLOSURE.

Section 125 of the Truth in Lending Act (15 U.S.C. 1635) is amended by inserting after subsection (h) (as added by section 110) the following new subsection:

"(i) RESCISSION RIGHTS IN FORECLOSURE.—

"(1) IN GENERAL.—NOTWITHSTANDING SECTION 139, AND SUBJECT TO THE TIME PERIOD PROVIDED IN SUBSECTION (F), IN ADDITION TO ANY OTHER RIGHT OF RESCISSION AVAILABLE UNDER THIS SECTION FOR A TRANSACTION, UPON AN ACTION OF A CREDITOR TO EXECUTE FORECLOSURE ON THE PRIMARY DWELLING OF AN OBLIGOR SECURING AN EXTENSION OF CREDIT, THE OBLIGOR SHALL HAVE A RIGHT TO RESCIND THE TRANSACTION EQUIVALENT TO OTHER RESCISSION RIGHTS PROVIDED BY THIS SECTION, IF—

"(A) A MORTGAGE BROKERS FEE IS NOT INCLUDED IN THE FINANCE CHARGE IN ACCORDANCE WITH THE LAWS AND REGULATIONS IN EFFECT AT THE TIME THE CONSUMER CREDIT TRANSACTION WAS CONSUMMATED; OR

"(B) THE FORM OF NOTICE OF RESCISSION FOR THE TRANSACTION IS NOT THE APPROPRIATE FORM OF WRITTEN NOTICE PUBLISHED AND ADOPTED BY THE BOARD OR A COMPARABLE WRITTEN NOTICE, OR WAS NOT PROPERLY COMPLETED BY THE CREDITOR.

"(2) TOLERANCE FOR DISCLOSURES.—NOTWITHSTANDING SECTION 106(F), AND SUBJECT TO THE TIME PERIOD PROVIDED IN SUBSECTION (F), FOR THE PURPOSES OF EXERCISING ANY RESCISSION RIGHTS FOLLOWING AN ACTION BY A CREDITOR TO FORECLOSE ON THE PRINCIPAL DWELLING OF THE OBLIGOR SECURING AN EXTENSION OF CREDIT, THE DISCLOSURE OF THE FINANCE CHARGE AND OTHER DISCLOSURES AFFECTED BY ANY FINANCE CHARGE SHALL BE TREATED AS BEING ACCURATE FOR PURPOSES OF THIS SECTION IF THE AMOUNT DISCLOSED AS THE FINANCE CHARGE DOES NOT VARY FROM THE ACTUAL FINANCE CHARGE BY MORE THAN $35 OR IS GREATER THAN THE AMOUNT REQUIRED TO BE DISCLOSED UNDER TITLE.".

APPENDIX 5

[2] 104th Congress; 1st Session

House Rpt. 104-193 (1 of 2, Due to its size, this report has been split into two sections.)

104 H. Rpt. 193

FINANCIAL INSTITUTIONS REGULATORY RELIEF ACT OF 1995

DATE: July 18, 1995. Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

SPONSOR: Mr. Leach submitted the following Report

COMMITTEE: from the Committee on Banking and Financial Services

(To accompany H.R. 1858)
(Including cost estimate of the Congressional Budget Office)
together with MINORITY AND ADDITIONAL VIEWS

TEXT:

The Committee on Banking and Financial Services, to whom was referred the bill (H.R. 1858) to reduce paperwork and additional regulatory burdens for depository institutions, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

* * *

[19] SEC. 113. RESCISSION RIGHTS IN FORECLOSURE.

Section 125 of the Truth in Landing Act (15 U.S.C. 1635) is amended by inserting after subsection (h) (as added by section 110) the following new subsection:

''(i) Rescission Rights in Foreclosure.

''(1) In general. Notwithstanding section 139, and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, upon an action of a creditor to execute foreclosure on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if

''(A) a mortgage brokers fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

''(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, or was not properly completed by the creditor.

''(2) Tolerance for disclosures. Notwithstanding section 106(f), and subject to the time period provided in subsection (f), for the purposes of exercising any rescission fights following an action by a creditor to foreclose on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance

charge does not vary from the actual finance charge by more than $ 35 or is greater than the amount required to be disclosed under this title.''.

* * *

[120] Section 113. Rescission Rights in Foreclosure

This amendment adds a new subsection to section 125 of TILA giving consumers the right to rescind a loan within the three-year time period established in section 125(f) of TILA as a defense if the creditor brings an action to foreclose on the consumer's principal dwelling in three specific instances: improper treatment of borrower-paid mortgage broker fees in calculating the finance charge, use of the incorrect form of notice of the right of rescission, and disclosure of a finance charge which understates the actual finance charge by more than $ 35. The consumer protection provisions of this section are intended to benefit consumers that are unable to meet their mortgage obligations and are not intended as a mechanism whereby consumers can avoid their obligations by defaulting and then raising the defense in foreclosure. Nothing in this section is intended to override the exceptions to the rights of rescission created in section 125(e).

Section 125(f) of TILA provides that the consumer's right of rescission expires on the earlier of three years after the date of consummation of the transaction or upon the sale of the property even if the consumer has not received the required disclosures or forms. Rescission rights expire in three years. The time period shall not be extended except as explicitly provided in section 125(f) relating to agency enforcement proceedings. However, section 125(f) does not affect any equitable remedies that may be available under State or common law.

Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

No. 97-5310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID R. BEACH AND LINDA M. BEACH, HIS WIFE,
Petitioners,

v.

OCWEN FEDERAL BANK,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF DOROTHY BOTELHO, JAMES AND LILLIAN BURNETT, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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No. 97-5310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID R. BEACH AND LINDA M. BEACH, HIS WIFE,
Petitioners,

v.

OCWEN FEDERAL BANK,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF DOROTHY BOTELHO, JAMES AND LILLIAN BURNETT, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Dorothy Botelho is a 73 year old widow who has lived in her home in Massachusetts for 44 years. She successfully raised re-

[1] All parties to this case have consented to the filing of this brief. Letters indicating consent have been submitted contemporaneously. This brief has not been approved or financed by any party to this case or their counsel.

scission under the Truth in Lending Act in the bankruptcy process as a recoupment to a proof of claim by Citicorp Mortgage Co.[2] On appeal to the Court of Appeals for the First Circuit, Citicorp has acknowledged that it failed to provide Ms. Botelho with required notice of her right to cancel and has defended the case solely on the ground that the time limit on rescission in the statute makes recoupment unavailable. The Court of Appeals has stayed Citicorp's appeal pending the outcome of this matter.

James and Lillian Burnett are 83 and 78 years old, respectively. They have owned their home in Brooklyn, N.Y., for more than 35 years. They have raised rescission under the Truth in Lending Act as a recoupment defense to a foreclosure action brought by Delta Funding Corporation. Delta made a mortgage loan to the Burnetts in 1991 through a loan broker based in Brooklyn. The loan was at a disclosed annual percentage rate (APR) of 15.31%. The lender failed to accurately disclose additional finance charges of $14,638.60 which were held back from the loan proceeds. The Burnetts contend that if their Truth-in-Lending disclosures had been accurate, the APR would have been disclosed at 36.43%. Their case is pending for trial in the Supreme Court of New York.

The National Association of Consumer Advocates (NACA) is a non-profit corporation. Its membership comprises attorneys from the private and public sector and legal services, law professors, and law students. All NACA members principally devote their legal practice or teaching efforts to the protection and representation of consumers. NACA's mission is to promote justice for all consumers. To that end, it maintains a forum for information sharing among consumer advocates across the country and serves as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. Its specific areas of concern include abusive practices by financial institutions in the

[2] *In re Botelho*, 195 B.R. 558, 567 (Bankr. D. Mass. 1996) *aff'd*, C.A. No. 96-12279 (D. Mass., March 7, 1997) *appeal pending* No. 97-1535 (1st Cir.).

extension of credit and the collection of debts and, in particular, abuses in the area of home equity fraud and equity skimming.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a non-profit organization of more than 900 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 150,000 bankruptcy cases filed each year. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues which can not adequately be addressed by individual member attorneys. It has joined this brief because the bankruptcy forum is frequently where consumer recoupment claims are raised.[3]

Amici believe that important rights are vindicated when consumer claims are raised by recoupment to claims by their creditors. In most cases, consumers do not fully evaluate their defenses to a contract until they are faced with a collection action — often after a relevant limitations period has expired.

Consumers should have the same right as businesses to raise recoupment in contract cases. The underlying principle that it is fundamentally unfair to allow one party to a lawsuit to proceed while denying the defenses of the other on procedural grounds is equally applicable in consumer cases.

SUMMARY OF ARGUMENT

The Florida Supreme Court erred in holding that a Truth in Lending Act (TILA) rescission claim could not be asserted defensively in recoupment. The language of the statute, as amended in 1995, makes clear that Congress intended to allow rescission for violations of TILA by recoupment, consistent with state law. 15

[3] *E.g., In re Fidler*, 211 B.R. 411 (Bankr. D. Mass. 1997); *In re Shaw*, 178 B.R. 380 (Bankr. D.N.J. 1994).

U.S.C. § 1635(i)(3). Inexplicably, the *Beach* court's holding ignores the relevant statutory provision, concluding without explanation that it does not apply to the case at hand.

The *Beach* court's reasoning conflicts with decisions from this Court expressly allowing the defensive use of time-barred claims in recoupment. As a matter of federal law, recoupment claims are not subject to statutes of limitation, as long as the main action is timely, but such claims are limited to the extent of the plaintiff's claim. Time-barred claims can be used to offset amounts allegedly due, but cannot result in an affirmative recovery. As consistently held by this Court, recoupment applies to statutory claims as well as common law claims, absent clear Congressional intent to prohibit recoupment.

Even prior to the 1995 statutory amendments to TILA which expressly recognize that recoupment rights apply to rescission claims, courts in several states had held that rescission claims based on violations of the federal Truth in Lending Act could be raised by way of recoupment. In 1995, Congress rejected a proposed amendment which would have overruled these cases and instead adopted a provision explicitly preserving rescission in recoupment consistent with state law, signaling its approval of these holdings. 15 U.S.C. § 1635(i)(3).

Notwithstanding that the decision of the Florida Supreme Court is couched in terms of Florida procedural rules, that Court has applied those rules in a manner designed to undermine an important federal right. The Court's blanket rule to deny defensive use of rescission to consumers by way of recoupment impermissibly usurps the judgment of Congress. This conclusion is particularly true, where, as here, the Court's bases for denying rescission are rooted, at bottom, on an erroneous evaluation of the federal law. The opinion of the Florida Supreme Court acknowledges that state law allows recoupment of rescission claims, but incorrectly and impermissibly interprets federal law to exempt TILA rescission claims.

Finally, Congressional language which preserves a defense for homeowners seeking to protect their shelter has a legitimate policy basis which is at least as weighty as the policy concerns raised by the mortgage lending industry. To the extent that the industry can present evidence that recoupment defenses based on consumer rescission rights undermine its business, it is fully capable of presenting that proof to Congress.

Most recently, however, by enacting 15 U.S.C. § 1635(i)(3) in 1995, Congress rejected the position espoused by the respondents and their amici in favor of setting public policy to preserve a consumer's right to raise TILA rescission as a recoupment defense in foreclosure. Sensibly, this helps elderly homeowners and families protect their shelter.

ARGUMENT

I. TILA MUST BE CONSTRUED IN A MANNER CONSISTENT WITH THE PURPOSE OF PROTECTING BORROWERS FROM THE UNINFORMED USE OF CREDIT.

The Truth in Lending Act was enacted in 1968 to regulate the disclosure of the terms of consumer credit transactions in order to "aid the unsophisticated consumer so that he would not be easily misled as to the total costs of financing." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 363-69 (1973). By requiring a set of uniform disclosures of credit terms, TIIA allows consumers to compare different financing options and their costs. 15 U.S.C. §1601(a); *Ford Motor Credit* v. *Milhollin*, 444 U.S. 555, 559 (1980). Prior to its enactment, consumers had no easy way to compare various credit options because creditors were not required to use a uniform method of calculating interest. *Mourning, supra*. Because TILA is a remedial statute, courts have long held that

TILA is to be liberally construed in favor of consumers. *Rodash* v. *AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994).[4]

To encourage compliance and ensure protection for all consumers, TILA violations are measured by a strict liability standard — "strict liability in the sense that absolute compliance is required and even technical violations will form the basis for liability." *Shepeard* v. *Quality Siding & Window Factory, Inc.*, 730 F. Supp. 1295, 1299 (D. Del. 1990). Therefore, "technical or minor violations of TILA, or Reg. Z, as well as major violations impose liability on the creditor and entitle the borrower to rescind [the loan]." *Jackson* v. *Grant*, 890 F.2d 118, 120 (9th Cir. 1989); *Semar* v. *Platte Valley Fed. S & L Assoc.*, 791 F.2d 699, 704 (9th Cir. 1986); *Mars* v. *Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983).

TILA subjects violators to claims for statutory damages, actual damages, and attorneys fees for disclosure violations. 15 U.S.C. §1640(a). In addition, where a non-purchase money security interest is taken in the borrower's home, the borrower has the unqualified right to "rescind," or cancel the loan, for three days after the transaction, or longer if the required disclosures are not made. 15 U.S.C. § 1635.

At the time of consummation of a rescindable credit transaction, the borrower must be given a disclosure statement containing all material information correctly disclosed. 15 U.S.C. § 1638. The borrower must also receive two copies of the notice of right to rescind, which clearly and conspicuously explains the borrower's rescission rights and how to rescind. 12 C.F.R. § 226.23(b). The rescission right is absolute for three business days following the latest of: the consummation of the transaction, the delivery of the

[4] *See also Fairley* v. *Turan-Foley Imports, Inc.*, 65 F.3d 475 (5th Cir. 1995); *Semar* v. *Platte Valley Fed. Sav. & Loan Ass'n.*, 791 F.2d 699 (9th Cir. 1986); *Bizier* v. *Globe Financial Services, Inc.*, 654 F.2d 1 (1st Cir. 1981); *Thomka* v. *A.Z. Chevrolet, Inc.*, 619 F.2d 246, 248 (3d Cir. 1980); *N.C. Freed Co. Inc.* v. *Governors of Fed. Reserve Sys.*, 473 F.2d 1210, 1214 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973).

right to rescind notice, or the delivery of all material disclosures. 15 U.S.C. §1635(a).

If the material disclosures or the notice of right to cancel are not provided as required, the borrower's affirmative right of rescission continues for three years from the date of consummation or until the sale of the property, whichever occurs first. 15 U.S.C. § 1635(f). The remedy of rescission is designed to be self-enforcing. If borrowers are not given accurate information when they enter into the loan, rescission restores the parties to their positions prior to the transaction. *Williams* v. *Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992).

The rescission provision was enacted "to give the consumer the opportunity to reconsider any transaction which would have the serious consequence of encumbering the title to his home." S.Rep. No. 368, 96th Cong., 2d Sess. 28 *reprinted in* 1980 U.S.C.C.A.N. 236, 264. Without the availability of the extended right to rescind, lenders can defeat the consumer's cancellation rights by failing to provide information about rescission at all or by providing misleading or inaccurate information. *See Rodash* v. *AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994). To assure compliance with the Act, Congress has made the rescission right available even when the misdisclosure did not affect the consumer's decision to enter the transaction. *Rodash, supra; Mayo* v. *Key Financial Services, Inc.*, 424 Mass. 862, 678 N.E.2d 1311, 1313 (1997).

As will be discussed more fully below, TILA was recently amended to expressly provide that the time limitation contained in the rescission section does not in any way affect a borrower's right to raise rescission by recoupment beyond the limitations period, consistent with state law. 15 U.S.C. 1635(i)(3). That amendment was made as part of a significant set of changes to the rescission provisions in order to protect the vitality of prior case law allowing rescission to be raised by recoupment after the statutory time lim-

its. It also safeguards the right in its most important context — protecting a family's home in foreclosure.[5]

Moreover, the amendment applies retroactively, "to all consumer credit transactions in existence or consummated on or after the date of enactment" of the amendments. 15 U.S.C. § 1635(i)(4). The amendment therefore applies to the *Beach* case.

II. The Florida Supreme Court Erred in Deciding That Rescission in Recoupment Is Barred by § 1635. The Language of the Statute as Amended and Relevant Case Law Regarding Recoupment Make Clear That Recoupment Is Available.

A. *Recoupment Is a common Law Doctrine of Long Standing Which Allows the Defensive Assertion of Time-barred Claims, But Limits Such Claims to the Extent of the Plaintiff's Claim. The Defense Applies to This Case.*

Recoupment is a well-established device of common law origin that enables a defendant to raise a counterclaim which is otherwise time barred against asserted liability arising out of the transaction forming the basis for the suit, but only to the extent of the asserted liability. *Reiter* v. *Cooper*, 507 U.S. 258, 264 (1993). Recoupment survives as long as the cause of action on the note exists. *Dawe* v. *Merchants Mortg. and Trust Corp.*, 683 P.2d 796, 799 (Colo. 1984); *In re Shaw*, 178 B.R. 380, 386 (Bankr. D.N.J. 1994). Recoupment claims at common law are limited to the extent of the plaintiff's claim and can never result in an affirmative recovery from the defendant.

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[5] The "bill protects the most vulnerable consumers. It provides consumers with Truth in Lending protections when faced with foreclosure. This bill will help many elderly keep their homes." Statement of Sen. Sarbanes, 141 Cong. Rec. S14567 (Sept. 28, 1995).

The availability of recoupment in contract-based cases has been repeatedly recognized and endorsed by this Court. *Bull* v. *United States*, 295 U.S. 247, 262 (1935):

> [R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.

See also, e.g., United States v. *Dalm*, 494 U.S. 596, 599 *reh'g. denied* 495 U.S. 941 (1990); *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424 (1965).

In *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 72, (1956) the Court stated:

> We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. If [the] litigation is not stale, then no issue in it can be deemed stale. The reason for this rule is that the purposes of statutes of limitations are not served by allowing one party to enforce claims while denying the other's related defenses.

See Burnett v. *New York Cent. R.R.*, 380 U.S. 424 (1965).

Although most of these cases have arisen in the context of contractual relations among businesses, there is no basis to distinguish defensive use of consumer claims. In fact, where the issue in-

volved is protection of the family home, there is special importance attached to preserving available defenses.[6]

Recoupment has been applied to claims created entirely by statute. For example, in *Reiter* v. *Cooper, supra*, the claim at issue arose under the Interstate Commerce Act (ICA). This Court found that claims for unreasonably high shipping tariffs under the ICA were subject to recoupment after the two year limitation period contained in the statute expired. *Id.* at 614. The Court quoted from an earlier case adopting the same conclusion: "Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges merely by waiting two years before filing suit." *Id.* at 616, *quoting, United States v. Western Pacific R. Co.*, 352 U.S. 59, 71, 1 L.Ed. 2d 126, 77 S.Ct. 161 (1956). *See also Burnett* v. *New York Cent. R. Co., supra* 380 U.S. at n.2 ("the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled."). The *Beach* court's reasoning is in direct conflict with these holdings.

The Florida Court's conclusion that § 1635 is a statute of repose rests to a large extent on the fact that the right of rescission is both created and limited by TILA. The cases cited above make clear that this factor is not dispositive, and that it is the *language* of the statute which must ultimately control.

The Florida Court cites two federal cases, *Simon* v. *United States*, 244 F.2d 703 (5th Cir. 1957), and *Maahs* v. *United States*, 840 F.2d 863 (11th Cir. 1988), in support of its reasoning that when the right and remedy are created by the same statute, the limitation on the remedy is treated as absolute. *Beach*, 692 So. at 152-153. Both of these cases, however, arose under the Federal Tort Claims Act (FTCA), which waives sovereign immunity for

[6] This principle was recognized by Congress when it explicitly referred to rescission rights in recoupment in a section labeled "rescission rights in foreclosure". Pub. L. No. 104-29, § 8 (Sept. 30, 1995) (15 U.S.C. § 1635(i)).

certain tort claims and creates a cause of action against the United States, which would otherwise be immune from suit. The FTCA provides that a "tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . " 28 U.S.C. § 2401(b). The FTCA does not contain express language leaving the question of recoupment to state law.[7] Moreover, any waiver of sovereign immunity must be read narrowly, *United States* v. *Kubrick*, 444 U.S. 111 (1979), unlike TILA, which has been liberally construed to protect consumers.[8]

Recoupment does not create an exception to the statute of limitations or extend limitations indefinitely. Recoupment claims are limited to the extent of a plaintiff's timely claim and are permitted only when the opposing claim arises out of the same transaction or occurrence. Therefore, lenders never have to pay out money following a successful rescission. The borrower can only defend against the lender's claim by asserting a claim in recoupment.

B. *TILA Rescission Claims Are Available Under the Recoupment Doctrine.*

Prior to 1995, the courts which considered this question were unanimous in holding that borrowers who were defending against a foreclosure could raise a rescission claim as a recoupment more than three years after the date of the loan, because the three year limitation in § 1635(f) governed affirmative claims only. *Dawe* v. *Merchants Mtg. & Trust Co.*, 683 P.2d 796 (Colo. 1984); *Westbank* v. *Maurer*, 276 Ill. App. 3d 553, 658 N.E.2d 1381 (1995)

[7] TILA includes such a provision in the form of 15 U.S.C. § 1635(i)(3).

[8] *See* note 4, *supra*, and accompanying text.

app. denied 166 Ill. 2d 555, 664 N.E.2d 648 (1996); *FDIC* v. *Ablin*, 117 Ill. App. 3d 390, 532 N.E.2d 379 (1988); *Community Nat'l. Bank & Trust* v. *McClammy*, 138 A.D. 2d 339, 525 N.Y.S.2d 629 (1988); *In re Shaw*, 178 B.R. 380 (Bankr. D. N.J. 1994).[9] These courts held that rescission claims arise out of the loan transaction on which the lender is seeking to foreclose and, therefore, recoupment applies. This body of law was preserved in 1995 when Congress enacted 15 U.S.C. § 1635(i)(3) protecting recoupment claims.[10]

Only the *Beach* court has barred a rescission claim raised in recoupment. Despite the *Beach* court's assertion that there is a split of authority on this issue, no other court which has squarely addressed this issue has refused to allow rescission by recoupment.

C. *Any Doubt on Whether the Statutory Time Limit Acts as an Absolute Bar to Recoupment Claims Has Been Resolved By Recent Amendments to TILA.*

In 1995, Congress confirmed that the overwhelming majority of courts were correct in holding that rescission claims are subject to recoupment rights if recoupment is available under state law. In the 1995 amendments to TILA, Congress added a new subsection to section 1635 titled "*Rescission Rights in Foreclosure.*" 15

[9] Cases other than *Beach* decided since the 1995 amendments have also been unanimous in allowing consumers to rescind by way of recoupment. *In re Botelho*, 195 B.R. 558, 567 (Bankr. D. Mass. 1996) *aff'd.* C.A. No. 96-12279 (D. Mass., March 7, 1997) *appeal pending* No. 97-1535 (1st Cir.); *In re Fidler*, 210 B.R. 411 (Bankr. D. Mass. 1997); *Transamerica Financial Services Inc.* v. *Abendroth*, slip opinion, CFN C8-96-4307 at pp. 7-8 (Minn. D.Ct., 10th Jud. Dist., April 17, 1997). Unlike *Beach*, these cases have considered the 1995 addition of 15 U.S.C. § 1635(i)(3) to the statute. The *Botelho* appeal had been stayed pending the outcome of the case before this court.

[10] Congress must be understood to have enacted this provision with an awareness of the existing case law. *See e.g., Dewsnup* v. *Timm*, 502 U.S. 410 (1992).

U.S.C. § 1635(i). This new section provided two additional grounds for rescission for borrowers facing foreclosure.

Though the new section states that the added rescission rights in foreclosure are subject to the (three year) time period in subsection (f), it also contains the following additional provision:

> *Right of recoupment under state law*: Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

15 U.S.C. § 1635(i)(3). This language can have only one meaning: rescission is available by recoupment after the expiration of the time limit consistent with state law.[11] Congress also specifically provided that "This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995." 15 U.S.C. § 1635(i)(4). Consequently, the new provision applies both prospectively and retroactively. The new provision applies to the *Beach* mortgage loan because it was in existence on the effective date of the amendments.

In light of these statutory pronouncements, there can be no room for argument that § 1635(f) is a statute of repose.[12] If Congress intended section 1635(f) to be an absolute bar prohibiting recoupment, there would be no reason to add the new language which leaves the availability of the consumer's right of recoupment to state law, and makes the subsection applicable to all existing consumer credit transactions.

[11] This provision makes the treatment of rescission rights by recoupment consistent with treatment of other claims under TILA. *See* 15 U.S.C. § 1640(e).

[12] The language of the statute is unambiguous. The Court must give meaning to the plain language of the statute. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *U.S.* v. *Turkette*, 452 U.S. 576 (1981).

Congress' intent to allow recoupment is apparent from the language of the statute. Even if it were not, only the clearest Congressional language will support a holding that a claim under a federal statute is not subject to recoupment. *Reiter v. Cooper*, 507 U.S. 258 (1993); *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 71 (1956).

Because *Beach* concludes that *Congress* sought to prohibit recoupment in enacting § 1635(f), it must be overturned. As the above analysis makes clear, Congress has actually preserved recoupment in accordance with state law. The *Beach* court did not deny recoupment because of a state law limitation on the remedy, but rather because it interpreted the statute to preclude recoupment. While Florida state law may impose limits on the right of recoupment generally, as discussed in more detail in part III of this brief, Florida may not interpret federal law in way which conflicts with clear Congressional language.

1. Language adopting the *Beach* Court's interpretation was proposed in an earlier version of the amendments to TILA and was rejected by Congress.

On March 9, 1995, Representative Bill McCollum and others introduced a bill, H.R. 1184, 104th Cong., 1st Sess. (1995), to amend the Truth in Lending Act.[13] The bill included the following provision:

[13] Three other bills were introduced during the same period with virtually identical this language. H.R. 1858, § 111, 104th Cong., 1st Sess. (1995) (Banking Committee Chair Leach), H.R. 1362, § 111, 104th Cong., 1st Sess. (1995) (Rep. Bereuter); and S. 650, § 117, 104th Cong. 1st Sess. (1995) (Senators Shelby and Mack). A more complete description of the legislative history is included in the brief of the amicus curiae, American Association of Retired Persons.

Sec. 7. Limitation on Rescission period.

Section 125(f) [15 U.S.C. § 1635(f)] of the Truth in Lending Act (15 U.S.C. § 1635(f)) is amended by adding at the end the following sentences: "The expiration of the right of rescission pursuant to this subsection *shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of the 3-year period beginning on the date of the consummation of the transaction* or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. *This section shall supersede any State law which is inconsistent with any provision of this subsection.*"

H.R. 1184, 1995 CQ US HR 1184, 104th Cong. 1st Sess. (1995) (emphasis added).

The meaning of this proposed language could not be more clear. This provision would have, without a doubt, enacted the judgment of the *Beach* court and eliminated the right of rescission by recoupment after three years. This provision is the language that the mortgage bankers urged Congress to adopt. Congress declined. Not only was the proposed "limitation" language excised from the final bill, it was replaced with the current § 1635(i)(3), which *preserved* rather than preempted a borrowers state law right to assert claims in recoupment.

Congress' rejection of this language cannot be disregarded. *See, e.g., Bennett* v. *Kentucky Dept. of Education*, 470 U.S. 656, 665 at n.3 (1985) (rejection of an amendment by a later Congress has persuasive value when construing a statute); *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U.S. 519, 544 at n.44 (1979)

(rejection of a position by Congress considered in construing a statute). Here Congress not only repudiated the proposed amendment, it actually enacted language to the opposite effect.[14]

2. The legislative history of § 1640(e) does not support the *Beach* Court's holding.

The Florida Court placed substantial reliance on the fact that in 1980 Congress added language allowing recoupment to § 1640(e), the general TILA limitations provision, but did not at that time add similar language to § 1635. *Beach*, 692 So. 2d at 152. Again, the court overlooks the fact that Congress did add recoupment language in 1995.

Section 1640(e) provides that actions based on TILA disclosure violations must be brought within one year of the violation. 15 U.S.C. 1640(e). This section expressly provides that this limitation "does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by state law." This provision was added in 1980 to resolve a conflict among the courts as to whether these claims could be raised in recoupment. *See, e.g., In re Werts*, 48 B.R. 980 (E.D.Pa. 1985) (allowing recoupment); *Ballew* v. *Associates Fin. Services*, 450 F.Supp. 253 (D.Neb. 1976) (same); *Hewlett* v. *John*

[14] The holding of *Dawe* and other similar cases are also reinforced by this Congressional action. When a particular statutory interpretation by the courts has been explicitly brought to the attention of Congress, as here, and where Congress has not sought to alter that interpretation despite amending the statute in other respects, then "presumably the legislative intent has been correctly discerned." *See North Haven Board of Education* v. *Bell*, 456 U.S. 512, 535, 102 S. Ct. 1912, 72 L.Ed. 2d 299 (1982) *quoting Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940).

Blue, 344 So. 2d. 505 (Ala. Civ. App. 1976) *cert. denied* 344 So. 2d 509 (Ala. 1977) (holding that recoupment not available because TILA claim was not related to the subject matter of plaintiffs suit); *Basham* v. *Finance America Corp.*, 583 F.2d 918 (7th Cir. 1978) *cert. denied* 444 U.S. 825 (1979).

At the time the recoupment language was added to § 1640(e), there was no similar conflict among the courts with respect to rescission claims. The first reported decision on this issue, *Dawe, supra*, was issued in 1984. Thus, there was no reason in 1980 for Congress to address the rescission question at all.

In 1995, on the other hand, saving language was necessary. Absent the addition of 15 U.S.C. § 1635(i)(3), lenders could have argued that the reference in subsection (i)(1) to the time limitation in subsection (f) overruled case law, such as *Dawe*, about use of recoupment under state law in the context of foreclosure.

III. The Decision Below Conflicts With Federal Law

The conclusion that TILA right of rescission may be revived as a defense in recoupment does not fully resolve this case. By its terms, 15 U.S.C. § 1635(i)(3) conditions the availability of recoupment on state law. This condition expresses the same contingency as the parallel TILA provision under § 1640(e) applicable to recoupment generally ("except as otherwise provided by State law") and conforms to the teaching of this Court that enforcement of federal rights is subject to state "rules of procedure governing litigation in their own courts." *Felder* v. *Casey*, 487 U.S. 131, 138 (1988).

Application of state law is nevertheless subject to two relevant and well established principles of federalism. First, state courts are obligated to interpret and apply substantive federal law in accordance with federal standards. *Maine* v. *Thiboutot*, 448 U.S. 1, 10-11 (1980); *Sims* v. *Georgia*, 385 U.S. 538, 544 (1967); *Testa* v.

Katt, 330 U.S. 386, 390-92 (1947). The Florida Supreme Court, by its holding that the remedy of rescission is never available in recoupment, violates this fundamental principle. Is so holding, the state court has substituted its judgment for that of Congress.

Second, the Constitution prohibits states from adopting or applying their rules of practice in any manner that discriminates against a federal claim or that prevents effective enforcement of federal law:

> Under the Supremacy Clause of the Federal Constitution, the relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.

Felder, 487 U.S. at 138 (quotations omitted). The "federal right cannot be defeated by the forms of local practice," nor can state rules "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* In addition, state rules may not be "fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." *Wilson* v. *Garcia*, 471 U.S. 261, 279 (1985). *Accord Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 210 (1946). Therefore, review of a decision clothed in terms of state law necessarily requires further scrutiny in order to determine the true basis for its disposition:

> [T]his Court has an independent obligation to ascertain whether a judgment defeating enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds fair and substantial support in state law.

Howlett v. *Rose*, 496 U.S. 356, 366, n. 14 (1990) (quotation omitted). With particular relevance to the decision below, this examination must reveal whether a state ruling declining to enforce a federal right rests on "conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." *Testa*, 330 U.S. at 393 (quotation omitted).

A. *The Decision Below Is Based On an Erroneous Construction of Section 1635.*

These principles of faithful application of federal law and nondiscriminatory local practice provide the standards for examining the propriety of the holding below that TILA rescission is not permitted by recoupment in the Florida courts. If the rules of procedure in Florida or any other State do not recognize the right of recoupment as a matter of uniform State practice, the State may deny in its courts enforcement of the right of rescission by recoupment under TILA in a foreclosure action brought more than three years after closing. Conversely, if a state otherwise permits recoupment with regard to State claims, it is barred by the Supremacy Clause from discriminating against the federal right and from denying the defense to litigants in its courts.

The Florida Supreme Court appropriately viewed federal law as the initial source of its legal analysis. However, the Court's conclusion that § 1635 does not permit revival of rescission rights after three years is patently in error. Its belief that "Congress' intent regarding rights of rescission under TILA. . . . support[s] the majority opinion" of the intermediate Florida appellate court (692 So.2d at 149) is incorrect, as addressed in Section II, *supra*. Its refusal to

consider the 1995 adoption of 1635(i)(3) (*Beach*, at 149, n. 6) and its holding that § 1635(f) "unambiguously expresses Congress' intent to extinguish the statutory right of rescission three years after the transaction's closing" (*Beach*, at 152) incorrectly applies federal law. Its conclusion that "Florida law and federal law appear consistent" in refusing to permit recoupment, *Beach*, at 153, leaves no doubt but that the Court's holding is based on an erroneous application of federal law. Even its assessment of State public policy, discussed below, hinges on its belief that "Congress has not chosen to extend" the right of rescission past the initial three years and that it was at liberty to substitute its judgment as to the wisdom of the remedy for that of Congress. *Beach*, at 148, n. 4, and 151.

As acknowledged by the court below, "[i]n Florida, it is well established that the defense of recoupment may be asserted defensively where the underlying claim is barred by the statute of limitations." *Beach*, 692 So.2d at 150 (quotation omitted). on its face, therefore, the Florida Court's holding is constitutionally suspect, since it is at odds with this "neutral state rule regarding the administration of the state courts." *Johnson* v. *Fankell*, ___ U.S. ___, ___, 117 S.Ct. 1800, 1805 (1997). Upon inspection, it cannot be reconciled with the supremacy of federal law.

The Florida Court attempted to distinguish the unbroken line of Florida cases permitting recoupment on the grounds that "[n]one of the cases (permitting recoupment] addressed a TILA-type statute where the act created the right and provided a remedy." *Beach*, 692 So.2d at 150. This distinction is a self-fulfilling, circular formulation that merely begs the federal question addressed above in Section II. If federal law does not allow TILA rescission to be revived in recoupment, whether as a result of this distinction or for any other reason, the defense admittedly is barred, but only as a matter of federal law. If, however, federal law permits its revival after three years, the distinction which the Court below found dispositive is simply a fundamental misapplication of federal law. In either event, the issue is one of the intent of the federal statute and

therefore a matter of federal law, not the neutral, nondiscriminatory enforcement of State rules allowed by the Supremacy Clause.

The three prior Florida Supreme Court decisions which have recognized recoupment defenses confirm the uniform rule of State practice that must be applied to this federal claim. *Allie* v. *Ionata*, 503 So.2d 1237 (Fla. 1987); *Rybovich Boat Works* v. *Atkins*, 585 So. 2d 270 (Fla. 1991); *Beekner* v. *L.P. Kaufman*, 198 So. 794 (Fla. 1940). Each reaffirms that Florida permits recoupment as a defensive doctrine, including in rescission (*Allie* and *Rybovich*).

No State law principle exists to distinguish these prior cases, other than the right/remedy differentiation which the Court applied. However, that analysis only demonstrates that the court was limiting substantive federal law by use of a conflicting State rule of statutory construction. *Reconstruction Finance Corp.*, 328 U.S. at 208. *See, e.g., Howlett* v. *Rose*, 496 U.S. at 366 ("The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question . . .").

B. *Florida's Conclusion That Recoupment Based on Truth in Lending violations Is Inconsistent With Public Policy Is Contrary to Federal Law.*

To the extent that the Court below ruled on the basis of state law, it did so as a matter of state "public policy." *Beach*, 692 So. 2d at 151. The Court embraced the view of "the district court that the real danger is that borrowers could take advantage of the remedy throughout the entire life of the secured transaction . . . *Id.* Furthermore, it viewed TILA rescission as "a penalty provision to the creditor, not a remedy required in equity and good conscience beyond the statutory period of three years." *Beach*, 692 So.2d at 153.

These assessments each conflict with federal law. The "danger" that borrowers might assert a recoupment defense beyond the initial three year period is no danger at all but is the right guaranteed by federal law implementing the very policy decision that Congress made in adopting § 1635(i)(3).

Notwithstanding § 1635(i)(3), that "danger" is also the rule of law enunciated by this Court in *Reiter* v. *Cooper, supra*, that, absent "the clearest congressional language," an expired federal remedy may be revived defensively in recoupment. 507 U.S. at 264. Such a repudiation by a State court of federal law under the guise of a "danger" to local public policy is fundamentally in error. *Testa* v. *Katt*, 330 U.S. at 392-93.

Similarly, the pejorative characterization of the defensive use of TILA rescission as a "penalty," contrary to "equity and good conscience," is the precise grounds articulated by the State court and rejected by this Court in *Testa* v. *Katt, supra*, as an impermissible infringement on the authority of Congress to set national public policy. 330 U.S. at 392 ("[T]he fact that Rhode Island has an established policy against enforcement of statutes of other states and the United States which it deems penal, cannot be accepted . . .") This "penalty" exists as a matter of federal law.[15] It is a right conferred by Congress on every citizen, limited only by the non-discriminatory, neutral rules of State practice. Congress adopted this portion of TILA to protect ordinary homeowners from predatory lending practices as well as to insure that honest and ethical creditors who comply with the law are not competitively disadvantaged. 109 Cong. Rec. 2029-30 (1963) (remarks of Sen. Paul Douglas).

[15] If the right of rescission were a penalty, it could not be imposed against any governmental actor, in accordance with 15 U.S.C. § 1612(b) ("No civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States, or any department or agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision thereof.") However, the federal courts have held that TILA rescission is not a penalty barred by this provision. *FDIC* v. *Hughes Development Co.*, 684 F.Supp. 616, 621-23 (D.Minn. 1988); *FDIC* v. *Monterrey, Inc.*, 847 F. Supp. 997, 1004, n.9 (D. P.R. 1994).

The Florida Court's rejection of the federal law here, couched in terms of State law, warrants the same response as this Court articulated in *Howlett* v. *Rose, supra*:

> These reasons . . . are not the kind of neutral policy that could be a "valid excuse" for the state court's refusal to entertain federal actions. To the extent that the Florida rule is based upon the judgment that parties who are otherwise subject to the jurisdiction of the court should not be held liable for activity that would not subject them to liability under state law, we understand that to be only another way of saying that the court disagrees with the content of federal law.

496 U.S. at 379.

The Florida Court attempted to disguise its rejection of Congressionally established policy as one which is based on the equities of the rescission remedy. *Beach*, 692 So. 2d at 150. Congress, however, has already made that determination in favor of allowing homeowners the right to raise rescission by recoupment.

Moreover, Congress and the Federal Reserve Board have limited consideration of the equities to expressly delineated elements of a rescission claim. The elements on which equities can be considered concern the time and procedures for implementing the rescission remedy — not the existence, scope or application of the rescission right itself.

The Truth in Lending Act is, for the most part, designed as a strict liability statute. outcomes do not depend on whether the violation caused harm to the defendant and Congress has required re-

lief for some violations which courts have described as "technical".[16]

However, Congress has allowed trial courts some latitude to modify statutory rescission remedies, but not liability, by exercise of equitable discretion. 15 U.S.C. § 1635(b). The Federal Reserve Board, through its adoption of Regulation Z and its Official Staff Commentary, has given effect to this provision, explicitly stating that such modification may occur "when the equities dictate." 12 C.F.R. Part 226, Supp. I, § 226.23, comment 23(d)(4)-1, p. 402 (1997).[17] *See* 12 C.F.R. § 226.23(d)(4) (1997).

Under the statute and regulations, a court may not refuse to grant rescission for violations which Congress has delineated and it may not prevent the resulting voiding of the underlying mortgage or the cancellation of liability for finance charge. A court has discretion to modify only the date of performance by the lender and the consumer's obligation to tender. 12 C.F.R. § 226.23(d)(4).[18] A court cannot appropriately go beyond this mandate, as the Florida Court has done, and make its own independent judgment of the equities underlying exercise of the rescission remedy itself.

If the Court had applied a neutral rule that recoupment is subject to equities, it would have had to evaluate the *Beaches*' circumstances and deny rescission only if it found, for example, that they engaged in bad faith in a strategic default. It did not do that. It did not consider any case by case concern and instead held that TILA

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[16] *See* Part I, *supra*.

[17] Federal Reserve Board staff commentary to the regulation is entitled to great deference. *Ford Motor Credit* v. *Milhollin*, 444 U.S. 555, 559 (1980).

[18] Courts acting under this grant of equitable power recognize that their discretion is considerable and have shown no reluctance to use it when deemed appropriate. Indeed, the Eleventh Circuit, in a case arising from Florida, stated that "a court may impose conditions that run with the voiding of the creditor's security interest upon terms that would be equitable and just to the parties in view of all surrounding circumstances." *Williams* v. *Homestake Mortgage Company*, 968 F.2d 1137, 1142 (11th Cir.1992).

rescission by recoupment is never available because the federal remedy itself is inequitable as a "penalty."

Had the Court properly applied federal law in conformity with State rules of procedure, it would have been compelled to answer the certified question in the affirmative for the general proposition presented and order a remand to the trial court to weigh the specific equities of this case, as permitted by § 1635(b). Its holding instead that TILA rescission may never be revived in recoupment, irrespective of the facts or equities of an individual case, exposes the decision simply as condemning federal policy. Accordingly, this matter must be reversed and remanded for further proceedings anchored in the correct rule of federal law.

IV. There Is No Legitimate Policy Basis to Affirm the Florida Supreme Court.

In prior similar cases, lenders and their amici have predicted the near collapse of the mortgage lending industry if consumers are allowed to rescind their loans and keep their homes. They claim that older loans will immediately become vulnerable to late rescission claims and that lenders will have lost a necessary finality to their potential for liability under TILA. They predict billions of dollars of potential losses.

This hyperbole can be discarded. It has been established in some jurisdictions since 1984 that TILA rescission claims may be raised by recoupment. congressional action in 1995 does not make mortgage loans any more vulnerable to rescission because they always were subject to rescission.

If the fears of mortgage lenders were correct — that rescission class actions will flood the courts and the lending industry will face catastrophic losses if the decision below is allowed to stand — then one would expect to have seen these effects in the states where courts have already expressly ruled that rescission by recoupment

is available. (These states are Colorado, Massachusetts, New Jersey, New York, and Illinois). There is no evidence, however, that this has occurred.

Recoupment claims are unsuitable to be raised in a class action since a prior claim against the individual consumer is a prerequisite. Recoupment can only be raised defensively on a case by case basis — preventing the feared flood of claims.

Another reason that rescission by recoupment does not flood the courts is that lenders commit violations supporting rescission in only a very small percentage of their loan originations. Moreover, the right to rescind applies only to non-purchase money mortgages. Nationally, approximately 1% of all mortgages result in foreclosure.[19] The right to rescind by recoupment arises in only an infinitesimal number of these cases.

In addition, creditors retain a right under the TILA to correct disclosure errors at any time in order to avoid liability. 15 U.S.C. § 1640(b). In the unlikely event that a violation will cause a large number of rescission cases, by recoupment or otherwise, the creditor has a simple procedure for correcting the error after the first case is brought, thus removing any possible uncertainty about potential liabilities.

Further, if borrowers pursue rescission defensively after the limitations period has run, the exposure of lenders is strictly limited to the amounts the lender is seeking to collect. In no case would a lender be required to pay even one dollar to a rescinding borrower.

Finally, even if rescission by recoupment were likely to cause serious problems for the mortgage lending industry, this policy argument should be addressed to Congress rather than this Court. However, as discussed above, when the argument was presented to Congress in 1995, Congress evaluated and rejected it.

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[19] National Delinquency Survey, Mortgage Bankers Association of America (June 17, 1996) (data for first quarter of 1996).

CONCLUSION

For all the foregoing reasons, this court should reverse the decision of the Florida Supreme Court.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAVID R. BEACH and LINDA M. BEACH,
Petitioners,
v.
OCWEN FEDERAL BANK,
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF FEDERAL HOME LOAN MORTGAGE CORPORATION, FEDERAL NATIONAL MORTGAGE ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S COMMUNITY BANKERS, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, AND MORTGAGE BANKERS ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF FEDERAL HOME LOAN MORTGAGE CORPORATION, FEDERAL NATIONAL MORTGAGE ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICA'S COMMUNITY BANKERS, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, AND MORTGAGE BANKERS ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST[1]

The issue before this Court has profound implications for the mortgage lending industry and for individual consumer borrowers nationwide. Undersigned *amici curiae*

[1] Consents for the filing of this brief are being filed contemporaneously herewith. Pursuant to Supreme Court Rule 37.6, *amici* state that counsel for a party did not author this brief in whole or in part and state that no person, other than *amici*, their members and their counsel, made a monetary contribution to the preparation or submission of this brief.

respectfully submit this brief to explain why any reversal of the lower court's ruling may have widespread, negative effects on mortgage lending and finance, and on consumers as well.

Amici curiae are well situated to assist the Court. *Amici* Federal Home Loan Mortgage Corporation ("Freddie Mac") and Federal National Mortgage Association ("Fannie Mae") are corporations chartered by Congress, with the statutory mission of fostering and promoting a secondary market for the purchase and sale of mortgages on residential real estate. 12 U.S.C. §§ 1451 (Freddie Mac), 1716 (Fannie Mae). Both act in the secondary mortgage market to increase the liquidity of mortgage investments, and thereby make more capital available for home financing for consumers. *Amici* American Bankers Association, America's Community Bankers, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, and Mortgage Bankers Association of America are six leading mortgage industry trade associations.[2] Together, the association

[2] The associations are varied in their membership and focus. American Bankers Association is the largest national trade association of banks, having members in all fifty states and the District of Columbia that together hold approximately ninety percent of the domestic assets of the American banking industry. America's Community Bankers is the national trade association for 2,000 savings and community financial institutions and related businesses, which combined originated $125 billion in residential mortgages in 1995 alone. American Financial Services Association is an association of over 350 providers of financial services to consumers and small businesses, who are responsible for extending between 15 and 20 percent of all consumer credit in America today. Consumer Bankers Association is an association of members who, in combination, hold more than 900 bank and savings and loan charters, with total assets of more than $2.9 trillion. Consumer Mortgage Coalition is an association of leading nationwide mortgage lenders and servicers. And, Mortgage Bankers Association of America has 3,000 members active in the mortgage finance field, including commercial banks, mortgage banking firms, title companies and savings and loan associations.

amici represent the entities—commercial, savings and cooperative banks, savings and loan associations, mortgage companies, and other financial institutions—that are responsible for originating most home mortgage loans made in America today.[3]

STATEMENT OF THE CASE

As a supplement to Petitioners' Statement, *amici* believe it is important to add the following.

This case arises only because Petitioners David and Linda Beach breached their obligation to repay $97,300 that they had borrowed on August 15, 1986 from Respondent's predecessor, Great Western Bank ("Bank"). Joint Appendix 49, ¶ I.1, 50, ¶ II.1, 80 ("J.A."). The Beaches stopped paying on their 30-year loan on November 1, 1991. *Id.* 49-50, 90. The Bank then tried to foreclose on the Beaches' property, a right permitted in the loan contract, as its way of recovering the loan funds. *Id.* 27.

The Beaches did not deny their breach. J.A. 55, ¶ 8. Instead, they defended the suit on their 1991 default by raising the collateral issue of alleged violations of the Truth in Lending Act, 15 U.S.C. §§ 1601-1649 (1994 & Supp. 1995) ("TILA"), at the 1986 loan closing. The Beaches sought to rescind the loan, under 15 U.S.C. § 1635, as a matter of equitable recoupment. J.A. 51-52.

Rescission would have given the Beaches a windfall. David and Linda Beach admit they owed the Bank, and did not pay, over $115,000 in principal, interest and other sums. J.A. 55, ¶ 8. In defending the foreclosure by demanding rescission under TILA, the Beaches sought the statutory remedy contained in 15 U.S.C. § 1635. That remedy would have invalidated the mortgage, and re-

[3] Respondent Ocwen Federal Bank is a member only of *amicus curiae* Mortgage Bankers Association of America and not of any other *amici* filing this brief.

quired the Bank to pay back the approximately $50,000 in loan interest paid by the Beaches during the five years since the closing. J.A. 55, ¶ 7.[4] This huge refund was justified in equity, the Beaches argued, because of TILA errors by the Bank. But those errors that the Beaches allege would permit them to rescind their obligation were the lender's *overstatements* of the cost of credit, in several respects, on the TILA disclosure form. J.A. 62-65.[5] There is no suggestion in the record that they were misled or misunderstood their commitment, or that they were actually overcharged, or that they would not have taken the loan had the disclosures been accurate. Indeed, since the Bank had overstated the costs of the loan on its disclosure form, the Beaches actually obtained from the Bank a better deal than they had thought.

SUMMARY OF ARGUMENT

The Florida Supreme Court held that the statutory three-year deadline on the rescission right contained in TILA applies when the borrower attempts to rescind a loan, either as a defense to foreclosure or as an affirmative claim. *Beach v. Great Western Bank*, 692 So. 2d

[4] As set forth at pages 9-10 herein, a borrower who rescinds a loan is entitled to be repaid, among other moneys, all loan interest previously paid. The record is unclear about the precise amount of interest paid by the Beaches before they defaulted, giving only an amount of $52,376.71 for what the Beaches had made in "payments and late charges." J.A. 55, ¶ 7. From the record, it can be determined that $2,621.32 of those payments was principal repayment, which is not refunded to the Beaches even if rescission is permitted. *Compare* J.A. 49, ¶ 1 (original principal balance) *with* J.A. 50, ¶ 2 (principal balance owed). While some of the remaining $49,755.39 is undoubtedly late charges, not refundable in a rescission, one can assume those amounts may well have been offset by some of the closing costs from the origination of the loan, which the Beaches would have recovered in rescission.

[5] Although the trial court also found that the Bank had improperly classified a state transfer tax (J.A. 68-70), this ruling ultimately proved to be wrong as a matter of law. *Beach v. Great Western Bank*, 670 So. 2d 986, 993 n.4 (Fla. Dist. Ct. App. 1996), *aff'd*, 692 So. 2d 146 (Fla. 1997), *cert. granted sub nom. Beach v. Ocwen Federal Bank*, 118 S. Ct. 294 (U.S. Oct. 14, 1997) (97-5310).

146 (Fla. 1997), *applying* 15 U.S.C. § 1635(f), *cert. granted sub nom. Beach v. Ocwen Federal Bank*, 118 S. Ct. 294 (Oct. 14, 1997) (97-5310). This Court's review of the *Beach* ruling has nationwide implications for mortgage lending, because it could call into question the enforceability of mortgage loans older than three years that banks, mortgage companies and others involved in mortgage finance now believe are valid. The value of mortgage loans that could be affected is in the billions of dollars.

The statute does not authorize borrowers to exercise any right of rescission beyond an explicit three-year deadline. The operative section of TILA is clear that any rescission rights "shall expire" three years after closing of the loan. 15 U.S.C. § 1635(f). Borrowers, such as the Beaches, who break their promises to repay their mortgage loans are not granted any exemption from the statutory time bar. Indeed, recent TILA amendments incorporate the same time limit upon the exercise of any rescission rights in response to a lender's attempt to foreclose. While those same amendments saved the right to rescind "under State law" in a foreclosure situation, that savings clause did not create any special federal right under TILA to enable defaulting borrowers to cancel their loans without regard to the three-year deadline. 15 U.S.C. § 1635(i)(3).

This Court should not imply or create any right that enables borrowers to raise an expired rescission claim, as a defensive maneuver, years after obtaining the loan. Recognizing such an open-ended power would lead to inequitable results and would likely harm consumer borrowers generally, as well as lenders.

Rescission is, by statute, an equitable remedy, and recoupment principles upon which Petitioners rest are equitable in nature. Ironically, though, when an expired rescission right is permitted to be exercised many years after the closing, due to a TILA violation at closing, the

effects of that rescission are unfair. The statutory rescission remedy requires that the holder of the loan release the mortgage and repay to the borrower (or credit to his account) all of the finance or other charges, including interest, ever paid on the loan. As a result, the holder of a mortgage note rescinded many years after closing invariably would be required to refund tens of thousands of dollars to the borrower. The borrower—who breached the loan contract and would usually be in foreclosure or bankruptcy court—would end up with a loan that retroactively had been rendered interest-free and unsecured. This result is a windfall, because most TILA errors of the type that are uncovered only years after closing are technical, and did not cause any harm to the borrower. Moreover, Congress has preserved the right of borrowers to seek actual damages, in defense to any action to collect on the note, no matter when brought, if the borrower was harmed by the TILA error.

The potential cumulative effect of the interest refunds that Petitioners seek to permit could be staggering. Further, the ability of lenders to collect the remaining principal would be jeopardized because rescission renders the loan unsecured. In the end, those losses to the lending community from rescissions in equitable recoupment would be passed on to future borrowers by way of higher interest costs on loans. Certain individuals may save their property from foreclosure, but millions of others would pay more—or even be unable to buy their own home as mortgage costs are driven higher.

If *Beach* is reversed and Petitioners' arguments become settled law, these effects would aslo be felt in the secondary mortgage market. *Amici* highlight these effects here. Many mortgage loans have been sold to other financial institutions or secondary market participants—about half of all originations since at least 1989. Many such loans support mortgage-backed securities. The efficient functioning of the secondary mortgage market, a goal furthered by specific Congressional enactments, is likely to

be disrupted if many older loans might become newly subject to rescission.

ARGUMENT

I. THE RIGHT OF RESCISSION UNDER TILA IS HIGHLY TECHNICAL, AND ITS EXERCISE CAN YIELD A WINDFALL TO BORROWERS.

TILA and its right of rescission are powerful tools which use highly technical disclosure rules to police the lending process. Like many other consumer protection acts, TILA is intended to create a balance between consumer borrowers and lenders. *See, e.g., N.C. Freed Co. v. Board of Governors*, 473 F.2d 1210, 1214 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973). However, the law is not intended to "create new inequities or plac[e] burdens on business beyond those necessary to make required disclosures and to provide a balance of equities between the parties." *Mechanics National Bank of Worcester v. Killeen*, 384 N.E.2d 1231, 1238-39 (Mass. 1979).[6]

A. TILA Disclosure

TILA is generally a disclosure statute. So far as is pertinent here, TILA requires that at the closing of a home mortgage loan the lender must provide to the borrower certain numerical information about the cost of the credit being extended and must disclose that the borrower has the right, in certain instances, to rescind the transaction. 15 U.S.C. § 1631(a). The required numerical disclosures are highly complex, and it is not difficult to commit error. Determination of two of the figures, the

[6] The *Killeen* Court was construing the then-current Massachusetts version of the Truth in Lending Act, a statute virtually identical to TILA. *Compare* Mass. Gen. L. c. 140C, § 10 (1969 ed.) *with* 15 U.S.C. § 1635 (1974 ed.). *See* Regulation Z, *Federal Reserve Board Official Staff Commentary*, 12 C.F.R. Part 226, Supp. I § 226-.29(a)(4) (Federal Reserve Board determined Massachusetts statute supplants TILA with respect to rescission because it provides greater consumer protection).

amounts of the "finance charge" and "amount financed," requires the lender to characterize accurately each closing cost and post-closing payment, often in the face of conflicting case law and in the absence of clear regulatory guidance. The calculation of the "annual percentage rate" takes those figures and applies a difficult economic model which itself consumes thirteen pages in the Code of Federal Regulations. 12 C.F.R. Part 226, App. J. Despite the complexity of the law and regulations, TILA requires absolute compliance, within limited error tolerances, and does not require any showing that the lender knowingly violated the law. 15 U.S.C. § 1640(a).

B. Availability of Rescission Under TILA

TILA also provides that the borrower in the case of certain types of loans has an absolute right to change his or her mind about the loan during a three-day "cooling off" period after the loan closes, and to rescind the entire transaction with no penalty. 15 U.S.C. § 1635(a). The three-day right of rescission is absolutely at the borrower's option; there does not need to be any error in the TILA disclosures in order for the borrower to rescind. The statute generally limits the availability of rescission rights to most refinance loans, such that the right applies to about 40% of all home mortgage loans made in America today. 15 U.S.C. § 1635(e)(1) (purchase-money and certain other loans exempt from rescission). *See* Mortgage Bankers Association of America, *Weekly Mortgage Survey: Nov. 28, 1997* (41% of home loans are refinance transactions).

Where there are "material" disclosure errors at the loan closing,[7] the rescission period remains open until proper

[7] The rescission period is extended until the rescission forms and related disclosures are given "together with a statement containing the material disclosures" under TILA. 15 U.S.C. § 1635(a). Those material disclosures include numerical disclosures, within specified error tolerances, of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule. 12 C.F.R. § 226.23(a)(3) & n.48.

disclosures are made, but in no event for a period longer than three years. 15 U.S.C. § 1635(f). It often does not take much of a TILA error to keep the period open for up to three years. Only a small tolerance is permitted for certain errors in the numerical aspects of the disclosure. *See, e.g.*, 15 U.S.C. § 1635(i)(2) (error of $35.00 in "finance charge" disclosure renders loan subject to rescission in foreclosure); *Mayo v. Key Financial Services, Inc.*, 678 N.E.2d 1311, 1312-13 (Mass. 1997) ($28 in closing costs misclassified); *Cheshire Mortgage Service, Inc. v. Montes*, 612 A.2d 1130, 1141 (Conn. 1992) ($55 error). Compliance with the other disclosure rules, such as the requirement to give a written statement disclosing the right of rescission, is tricky and has spawned its own body of case law and regulatory rules. *See, e.g.*, 15 U.S.C. § 1635(i)(1)(B) (use of wrong form renders loan subject to rescission); *Semar v. Platte Valley Federal Savings & Loan Association*, 791 F.2d 699, 704 (9th Cir. 1986) (failure to disclose expiration date of right, although form did disclose that right expired after three days); *Simmons v. American Budget Plan, Inc.*, 386 F. Supp. 194, 200 (E.D. La. 1974) (failure to give rescission notices to each co-borrower).

C. Mechanics of the Rescission Remedy

If a borrower rescinds a loan, TILA voids the security interest on the property immediately. 15 U.S.C. § 1635(b). Within twenty days, the holder of the loan (whether or not the original creditor) must repay to the borrower all sums previously paid by the borrower on account of the loan, whether or not those amounts had been paid to that holder or to the original lender. 15 U.S.C. §§ 1635(b); 1641(c) (loan may be rescinded against "any assignee"). Among the sums that clearly must be returned to the borrower upon rescission are all interest paid and most closing costs, including loan "points." *See* Regulation Z, *Federal Reserve Board Official Staff Commentary*, 12 C.F.R. Part 226, Supp. I

§ 226.23(d)(2). After all of these sums have been returned by the creditor to the borrower, the borrower must return to the creditor the principal balance on the loan. 15 U.S.C. § 1635(b).[8]

Since a successful rescission results in a refund to the borrower of all of the interest he or she has paid, the retroactive effect is to grant the borrower an interest-free and unsecured loan with little or nothing in closing costs. *Truth in Lending: The Right to Rescind and the Statute of Limitations*, 14 Pace L. Rev. 633, 657-58 (Summer 1994). The extended rescission remedy is plainly a drastic one for lenders who do not give the proper disclosures. While Congress and the Federal Reserve Board have concluded that some errors justify keeping the cooling off period for rescission open for a time, those bodies have done so in the context of a clear three-year deadline on the face of the law. Any extension of an unlimited right to rescind beyond the outside boundary set by Congress would amount to a windfall for borrowers and a penalty upon lenders. Indeed, since a lender's exposure increases as time goes by, because the borrower keeps paying potentially-refundable interest, it is particularly important for the right of rescission to come to an end. This Court should not upset the balance struck by Congress by overriding the three-year statute as a matter of "equitable" recoupment.

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[8] As recognized by *amici* supporting Petitioners, a court has the power to refuse to permit rescission in appropriate circumstances. *E.g. In re Cox*, 162 B.R. 191 (Bankr. C.D. Ill. 1993). *See* Brief of Dorothy Botelho, James and Lillian Burnett, the National Association of Consumer Advocates, and the National Association of Consumer Bankruptcy Attorneys as *Amici Curiae* In Support of Petitioners, at 24-25 ("Botelho's Br."). TILA also rests broad discretion in trial courts to alter the procedures for the exercise of rescission, such as by crediting sums to be paid by the borrower against sums owed by the lender. *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1142 (11th Cir. 1992); 15 U.S.C. § 1635(b).

II. THE FLORIDA SUPREME COURT'S REFUSAL TO ALLOW RESCISSION AFTER FIVE YEARS ENFORCES THE PLAIN LANGUAGE OF THE STATUTE, WHICH PLACES A THREE-YEAR LIMIT ON THE EXERCISE OF THE RIGHT OF RESCISSION.

The Florida Supreme Court acted correctly because it applied and enforced the language of the statute. Significantly for *amici*, it is this plain language that has guided market participants to understand that no loan is subject to rescission for TILA violations beyond the three-year deadline contained in 15 U.S.C. § 1635(f).

TILA explicitly establishes a time bar on the right of rescission:

> An obligor's right of rescission *shall expire* three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, *notwithstanding the fact that the information and forms required* under this section or any other disclosures required under this part *have not been delivered to the obligor*. . . .

15 U.S.C. § 1635(f) (emphasis added).[9]

The words chosen by Congress express an unmistakable intention that the three-year deadline was not meant to be subject to exceptions. The language is directive and definitive. The legislative choice to characterize the rescission right as one which "shall expire" is telling. *Webster's Third New International Dictionary* 801 (1986) ("expire" means "to become void through the passage of time"); *Black's Law Dictionary* 579 (6th ed. 1990) ("expiration" means "termination from mere lapse of time");

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[9] The only instance where the right does not expire at the end of three years is where there is an administrative proceeding to review TILA compliance concerning that loan, in which instance the rescission right may be extended to one year following the end of the administrative process (or a judicial review thereof). 15 U.S.C. § 1635(f).

Barron's Dictionary of Business Terms 211 (2d ed. 1994) ("expiration" means to "ceas[e] to be effective"); *Kaplysh v. Takieddine*, 519 N.E.2d 382, 385 (Ohio 1988) (collecting definitions); *Crease v. Babcock*, 40 Mass. (23 Pick.) 334, 346 (1839) ("expired" means "ceased to have force"). *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (action to be brought "in no event" more than three years after offering or sale of the security; deadline "can have no significance in this context other than to impose an outside limit"); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 (10th Cir. 1980) (Interstate Land Sales Full Disclosure Act; similar deadline is "absolute bar").[10]

Other elements of the structure of the statute support affirmance of the decision below. Congress has expressly permitted TILA violations to be raised "as a matter of defense by recoupment or set-off," but only with respect to claims for damages. 15 U.S.C. § 1640(e). In contrast, TILA amendments in 1995, adding 15 U.S.C. § 1635(i), confirmed that the three-year repose period applies equally to defenses and affirmative claims of rescission. Truth in Lending Act Amendments of 1995, Pub. L. 104-29, § 8, 109 Stat. 271, 275 ("1995 TILA Amendments"), *codified as* 15 U.S.C. § 1635(i). Those amendments specifically provided for certain new rights to exercise rescission as a defense to a foreclosure, but made those rights "subject to the time period provided in subsection (f)." 15 U.S.C. §§ 1635(i)(1), (2). Congress further limited the use of the right to rescind to the express parameters it established in 15 U.S.C. § 1635, by providing that "[e]xcept as specified" therein the right of rescission shall not affect the "validity or enforceability of any contract." 15 U.S.C. § 1610(d).

[10] In common usage, the word "expire" often is used to connote the ending of a period with no hope for revival, as in the use of the word to describe a person's death or the ending of an insurance policy.

Although the 1995 TILA Amendments added 15 U.S.C. § 1635(i)(3), which states that "nothing in this subsection affects a consumer's right of rescission in recoupment under State law," this language does not create a broad exception to the three-year deadline. The subsection is far from an express grant of federal rights to rescind loans where the right to rescind has expired, despite what Petitioners and their *amici* contend. Brief for Petitioners, at 20-22 ("Pet. Br."); Brief *Amicus Curiae* of the American Association of Retired Persons in Support of Petitioners, at 10-11 ("AARP's Br."); Botello's Br., at 12-14. By its terms, the subsection is nothing but a clause saving rights that arise "under State law," whereas TILA rescission arises under federal law.

It should not be interpreted otherwise, because such an interpretation renders as a nullity the express reference contained in subsections (i)(1) and (i)(2), governing rescissions in defense to foreclosure, to the general three-year time bar. If 15 U.S.C. § 1635(i)(3) were a grant of affirmative federal rights to rescind, unlimited in time, then the statute inconsistently would dictate that persons like the Beaches could *never* raise rescission in defense to foreclosure beyond the statutory time limit (15 U.S.C. §§ 1635(i)(1), (2)), except that they *always* could do so (15 U.S.C. § 1635(i)(3)). This construction is absurd, and must be rejected for that reason. *Pritzker v. Yari*, 42 F.3d 53, 67-68 (1st Cir. 1994) (statutes are to be interpreted to avoid absurd results), *cert. denied*, 514 U.S. 1108 (1995).[11]

[11] Nor should the language of subsection (i)(3) be stretched to benefit the Beaches on the theory that TILA must be liberally construed to protect consumers. Petitioner's Br., at 33; Botelho's Br., at 5-6. The proper rule of construction is that rescission rights under TILA should be construed liberally when necessary to effectuate the purpose behind the statutory remedy. *See, e.g., N.C. Freed Co. Inc. v. Board of Governors*, 473 F.2d at 1215; *Shepard v. Financial Associates of Auburn, Inc.*, 316 N.E.2d 597, 603 (Mass. 1974). Giving consumers the right to rescind forever, rather than

In enacting the 1995 TILA Amendments, Congress did not amend or qualify its earlier plain directive that all rescission rights under TILA "shall expire . . . notwithstanding the fact that . . . disclosures . . . have not been delivered to the obligor." 15 U.S.C. § 1635(f). Reading 15 U.S.C. § 1635(i)(3) to amend this deadline *sub silentio*, and to create endless federal rescission rights, is not a fair interpretation of Congressional intent as expressed in the law.

To the extent there is any uncertainty in the plain words of the statute, indicia in the legislative history support the interpretation that Congress did not intend to allow time-barred rescissions based on TILA to be raised as a defense to foreclosures. In 1972, both the Board of Governors of the Federal Reserve System and the National Commission on Consumer Finance recognized in separate reports to Congress that the possibility of an endless rescission right is a cloud on the enforceability of liens, and so recommended that the three-year time deadline on rescission be added to TILA. Board of Governors of the Federal Reserve System, *Annual Report to Congress on Truth in Lending for the Year 1971*, at 19 (Jan. 3, 1972); National Commission on Consumer Finance, *Consumer Credit in the United States*, at 190 (Dec. 1972). Congress subsequently amended the original law to so provide. *See* Pub. L. 93-495, § 405, 88 Stat. 1517, *codified at* 15 U.S.C. § 1635(f). Adding a "recoupment" exception for damages claims in 1980, Congress chose not to include any similar exception for rescission claims. Truth in Lending Simplification and Reform Act, Pub. L. 96-221, §§ 612(a), 615(a)(4), 94 Stat. 175, 180, *codified at* 15 U.S.C. §§ 1635, 1640. When the three-year

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just for three years, will not further the compliance goals of TILA to any meaningful degree. The existing right of rescission already is a powerful tool. It should not be a limitless penalty. *See James v. Home Construction Co. of Mobile, Inc.*, 621 F.2d 727, 730 (5th Cir. 1980) (rescission right not intended to be a penalty).

deadline was again left undisturbed in 1995, the Congressional floor leaders emphatically stated that rights of rescission in response to a foreclosure must be exercised within three years of the loan closing, or be lost forever. 141 Cong. Rec. S14568 (Sept. 28, 1995) (Statement of Sen. Mack); 141 Cong. Rec. H9515-9516 (Sept. 27, 1995) (Statement of Rep. McCollum). *See N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt"); 2A *Sutherland Statutory Construction*, § 48.12 (5th ed. 1992) (significant weight given to those "intimately involved with drafting of legislation"). In contrast, there is not a shred of legislative commentary, in committee reports or floor statements, that directly suggests Congress ever intended to either create or approve of a recoupment exception to the statutory expiration of the right of rescission.[12]

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[12] Even if TILA's statutory scheme were not antithetical to the recognition of a right of rescission in recoupment, such a right should not be allowed because the Beaches also cannot meet the fundamental predicate to recoupment that the foreclosure claim and the TILA claim arise from the same transaction or occurrence. *See Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 299-300 (1946). Most of those courts that have faced the issue have found that claims seeking a remedy for TILA violations and actions for foreclosure do not arise out of the same transaction or occurrence. *Eubanks v. Liberty Mortgage Banking Ltd.*, 976 F. Supp. 171 (E.D.N.Y. 1997) (collecting cases in federal circuit courts); *Bank of Oklahoma, N.A. v. Briscoe*, 911 P.2d 311, 318-319 (Okla. Ct. App. 1995). *Accord* Kathleen E. Keest and Gary Klein, *Truth in Lending* §§ 7.5.3.2, 7.5.5 at 393, 395 (3d ed. 1995 & Supp. 1996) ("Majority rule in the federal courts is that [foreclosure actions] are permissive" counterclaims to TILA claims). Generally speaking, claims concerning contract formation do not arise out of the same transaction as claims concerning contract breach, for purposes of the recoupment exception to a time bar. *See, e.g., SCM Corp. v. Fisher Park Lane Co.*, 358 N.E.2d 1024, 1027 (N.Y. 1976); *Union Electric Co. v. Mansion House Center North Redevelopment Co.*, 494 S.W.2d 309 (Mo. 1973).

III. A COMMON LAW EQUITABLE EXCEPTION TO RESCISSION DEADLINES WOULD BE HIGHLY INEQUITABLE.

Petitioners and their *amici* urge this Court to create an equitable recoupment exception to the statutory rule that no loan older than three years can ever be rescinded for TILA violations. This proposed exception is ill-advised, because it is entirely inconsistent with the equitable underpinnings of the recoupment doctrine. *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946). Recognizing a right of late rescission would be highly inequitable. Such a judge-made exception, if generally applied, would adversely affect the home mortgage market, involve the courts in litigation that Congress believed should be time barred, and yield windfalls for some borrowers.

A. Permitting Time-Barred Rescission Would Likely Lead To Significant Losses In The Home Mortgage Finance Market.

The issues in this case have the potential for calling newly into question the enforceability of many mortgage

with an enormous, unexpected and disproportionate loss. An example is helpful. Assume a $100,000 30-year mortgage loan was refinanced on January 1, 1990, at 9% interest with no origination charges. Assume further that the lender understated the finance charge by $36.00, an error that, for three years after closing, gives the borrower a right to rescind if the loan were to go into foreclosure. 15 U.S.C. § 1635(i)(2). By February 1, 1998, the hypothetical borrower in this example, would have made $70,297.17 in interest payments and $7,751.23 in principal repayment. The outstanding principal balance on the loan then would be $92,248.77. If the loan went into default at that point, the lender could expect to recover the principal balance through the foreclosure process. However, if the borrower was permitted to rescind the loan using equitable recoupment—even though he had enjoyed the use of the money for more than eight years—the lender would be required to return, or credit to the borrower's account, the entire $70,297.17 sum which the borrower had paid in interest over the years. The net amount of the remaining principal recovered by

has made it quite common that rescission is asserted against innocent assignees.[14]

Second, many, if not most, untimely rescissions are attempted on the eve of or during a bankruptcy case filed by the borrower. Upon rescission, the lender will have a mere unsecured claim for the principal balance in the borrower's bankruptcy. Even in a Chapter 13 case, a reorganization in which the debtor agrees to a plan for repayment of creditors, the creditor usually receives only pennies on the dollar of that unsecured claim, often over a long period of time.[15] One Bankruptcy Court has found

[14] It often is impossible for secondary market purchasers of mortgage loans to determine whether a loan is potentially rescindable. Eligibility for extended rescission is first a fact question about the nature of the transaction that gave rise to the loan, namely, whether it is the type of loan for which rescission is available. 15 U.S.C. § 1635(e) (listing exemptions). Second, the secondary market purchaser would need to determine whether any "material" disclosure errors occurred at the closing. 12 C.F.R. § 226.23(a)(3) & n.48. This often requires a decision on whether something was a "finance charge," a fact-intensive inquiry that depends, in part, on whether the charge was "imposed" by the creditor. 15 U.S.C. § 1605(a); 12 C.F.R. § 226.4(a). These facts are usually not noted in the loan file, and thus are beyond the knowledge of the investor that purchases the loan. Further, because of the large volume involved, the smooth functioning of the secondary mortgage market requires that most home mortgage loans are bought and sold without examination of individual loan files, with reliance instead upon representations and warranties by the seller that the loans are enforceable.

[15] For example, in the *Botelho* case, which involves *amicus* Dorothy Botelho, the Massachusetts Bankruptcy Court permitted rescission to be exercised in recoupment 5½ years after a TILA error was committed at the loan closing. *In re Botelho*, 195 B.R. 558 (Bankr. D. Mass. 1996). The lender found its mortgage voided, and the Court reduced the $64,108.27 owing by subtracting from the debt the amount of interest the borrower had paid and TILA statutory damages of $1,000. The resulting unsecured claim was only $22,729.17. The Court then approved Botelho's proposed Chapter 13 plan, which provides for the lender to be paid only $6,750 in total, and allows Botelho to do so in installments over five (5) years.

this lack of mutuality of remedy to be so egregious that rescission in recoupment could not be allowed. *In re Cox*, 162 B.R. 191, 197 (Bankr. C.D. Ill. 1993). While this problem arises whether or not rescissions occur during the three-year period, the unfairness is more pronounced the longer the loan is in effect.

By any market-wide measure, the potential for losses is great. Estimates suggest that some $5 billion in older mortgage loans to which the right of rescission ever attached are in foreclosure at any one time.[16] *Amici* know of no reliable estimate of how many of these loans have TILA errors that would allow rescission, but the danger is real. Technical violations of TILA are not unusual.[17] Lenders strive for one hundred per cent accuracy in compliance, but in such a large industry and with such a difficult statute to work with, errors do occur. One group of consumer lawyers believes such violations to be common enough that "[a]dvocates representing clients in [con-

[16] In order to be at risk for rescission beyond the three-year expiration of the right, the loan would have to be (i) more than three years old, (ii) in foreclosure and (iii) a qualifying loan, such as a refinancing. According to recent figures, total single family mortgage debt currently is in excess of $4.0 trillion. *Inside Mortgage Finance*, at 4 (Oct. 31, 1997). Of that, about $1.8 trillion in loans was more than three years old. *Inside Mortgage Finance*, at 12 (Nov. 14, 1997) ($2.2 trillion in loans originated during period 1994-1996). Applying current data that 40% of all home loans are refinancings, about $0.72 trillion in outstanding mortgage debt was a result of a refinance. One industry estimate puts at least 0.70% of all loans in foreclosure at any one time. *Inside Mortgage Finance*, at 6 (Dec. 5, 1997). That yields an estimated total of refinanced loans in foreclosure of about $5.04 billion.

[17] In Congressional testimony, the Chairman of the Federal Deposit Insurance Corporation has stated that "the complexity of Regulation Z [that implements TILA] is such that the FDIC cited more than 2,700 of the 3,500 institutions we examined in 1994 for at least one violation." *Hearing on Senate Bill 650 before Subcommittee on Financial Institutions and Regulatory Relief of the Senate Committee on Banking, Housing and Urban Affairs*, 104th Cong., 1st Sess., at 9 (May 2, 1995).

nection with foreclosures] who do not evaluate the case for the possibility of Truth in Lending rescission are flirting with malpractice." Kathleen E. Keest and Gary Klein, *Truth in Lending* § 1.1.2 at 33 (3d ed. 1995 & Supp. 1996). Even if only a small percentage of borrowers attempted to rescind in foreclosure after the expiration of the three-year period, the industry impact could run into the hundreds of millions of dollars each year.

Court decisions that pose a significant nationwide threat to the value of mortgages in turn threaten the availability of low interest loans that allow millions of Americans to acquire, borrow against or refinance their homes. Reversal of *Beach* could result in a wave of unexpected rescission claims that would increase unrecoverable losses borne by the very banks and savings associations to which consumers turn for additional loans, or, in some instances, borne by the participants in the secondary mortgage market. To offset these losses, mortgage originators might have to collect higher yields from borrowers, thus effectively raising mortgage interest rates and/or closing costs.

Higher mortgage costs are inflationary and ultimately are borne by everyone in the borrowing public. Among those hardest hit, if Petitioners prevail here, would be consumers who would like to become homeowners, or are struggling to hold onto their homes; in either case, higher costs will make it more difficult for these consumers to achieve or maintain home ownership. While Petitioners' *amici* attempt to champion the rights of consumers, the benefits those *amici* seek to create may well harm borrowers as a group.

In contrast to these tremendous potential losses and harms, borrowers asserting stale rescission rights usually present little reason why any court should use its equitable powers to aid them. Most often, such borrowers have suffered no harm from the TILA violation and never would have rescinded within the three-day cooling off period if the disclosures had been precisely correct. The case at bar

is a classic example of how unfair it would be to use the equitable doctrine of recoupment to permit the exercise of expired rescission rights. As noted, the TILA errors at the Beaches' closing were committed when the Bank *overstated* the cost of credit. The Beaches did not claim (nor could they credibly claim) that had the disclosure been correct they would have changed their minds about the loan, and rescinded. Instead, the violation was a technicality they seized upon years later when they defaulted for reasons unrelated to the TILA violation. This is consistent with the experience of *amici* that where borrowers attempt to rescind in recoupment, the TILA violations are typically minor and technical ones that the borrower does not even allege affected the decision to rescind.

It is important to observe that while preventing rescission after three years, Congress did not leave borrowers without a remedy in those instances where the borrower had been harmed by the TILA error. Under 15 U.S.C. § 1640(e), actual and statutory damages, plus attorney's fees, can be awarded in any action to collect on the loan, regardless of the one-year limitations deadline ordinarily applied to TILA damage actions. That is, borrowers who relied upon an erroneous TILA disclosure to their detriment always retain the right to be made whole through the remedy of an award of actual damages, if proven. 15 U.S.C. § 1640(a)(1); *Adiel v. Chase Federal Savings and Loan Association*, 630 F. Supp. 131, 133 (S.D. Fla. 1986) (actual damages awarded upon showing reliance and monetary loss). Enforcing Congress' decision to cut off the additional right of rescission simply prevents the borrower from being made more than whole.

Thus, the overall effect of a reversal of *Beach* will be negative, with no corresponding or off-setting equitable considerations. This is hardly a situation where the courts should use their equitable powers and invoke the equitable doctrine of recoupment to permit the exercise of expired rescission rights. Congress already has chosen to limit

extended rescission rights by the three-year deadline, and thus to prevent the significant losses that occur as a result of rescissions five, ten or fifteen years after loan closing. That judgment should not be upset.

B. The Ability To Rescind Loans Many Years After The Closing Is Likely To Encourage Litigation And Even Cause Abuse By Borrowers.

If *Beach* is reversed, and consumers obtain a right in equitable recoupment to exercise an untimely TILA rescission, there is a substantial risk that large numbers of consumers and their advocates will use that power to challenge foreclosures. There already is a substantial body of anecdotal evidence, from certain states where untimely rescissions have been attempted, of how serious this risk really is. The example of Florida is instructive. The Florida Supreme Court's *Beach* decision disposed of not only the dispute between the Bank and the Beaches, but also similar claims made in five other lawsuits in the appellate courts of Florida.[18] *Amici* are aware of some two dozen cases in the trial courts of Florida in the last several years in which late rescissions were attempted. In at least two instances, the loans were outstanding for about seventeen years before the borrower stopped paying and attempted to rescind defensively. *Fidelity Federal Savings Bank of Florida v. Fuchs*, Case No. CL 94-2478-AD (Fla. 15th Jud. Cir. Ct.); *Fidelity Federal Savings Bank of Florida v. Leibovit*, Case No. 96-6549-AI (Fla. 15th Jud. Cir. Ct.). In another case, the loan was so large and the attempted rescission was so late that the claimed refund of finance charges paid prior to the late rescission exceeded $500,000. *PNC Mortgage Corp. of*

[18] *BankAmerica National Trust Co. v. Zayas-Bazan*, 698 So. 2d 1261 (Fla. Dist. Ct. App. 1997); *Dove v. McCormick*, 698 So. 2d 585 (Fla. Dist. Ct. App. 1997); *Great Western Bank v. Shoemaker*, 695 So. 2d 805 (Fla. Dist. Ct. App.), *review denied*, 699 So. 2d 1375 (Fla. 1997); *Key Savings Bank, F.S.B. v. Dean*, 695 So. 2d 808 (Fla. Dist. Ct. App. 1997); *Kasket v. Chase Manhattan Mortgage Corp.*, 695 So. 2d 431 (Fla. Dist. Ct. App. 1997).

America v. Diaz, Case No. CL 95-8530-AD (Fla. 15th Jud. Cir. Ct.). *See also Transamerica Financial Services, Inc. v. Abendroth*, No. C8-96-4307 (Minn. 10th Jud. Dist. Ct. April 17, 1997) (borrower received rebate of $16,890.00 on $18,800 loan).

Florida is not an aberration. The issue before this Court is also before the First Circuit Court of Appeals. *Citicorp Mortgage, Inc. v. Botelho*, No. 97-1535 (1st Cir.), *stay issued* Oct. 29, 1997. A rapidly growing body of reported case law in only the last four years reflects what appears to be an exponential growth in the number of instances where untimely rescissions are being attempted, particularly in the Bankruptcy Courts.[19]

Abuse by the consumer may well be a feature of many of such suits. *Beach v. Great Western*, 670 So. 2d at 991, and 692 So. 2d at 151-52 (recognizing danger that borrowers unrestricted by the repose deadline can default in order to trigger their right to defensive use of rescission); *In re Audino*, 10 B.R. 135 (Bankr. R.I. 1981) (same). The case of *Signet Mortgage Corp. v. Tucker*, C.A. No. 96-10932-REK (D. Mass.), recently before District Judge Robert E. Keeton of the District of Massachusetts, provides a chilling example of how permitting late rescissions

[19] *E.g., Jones v. Saxon Mortgage, Inc.*, No. 3:96CV918, 1997 U.S. Dist. LEXIS 15113 (E.D. Vir. Aug. 5, 1997) (late rescission refused); *Nembhard v. Citibank, N.A.*, No. CV-96-3330, 1996 U.S. Dist. LEXIS 20062 (E.D.N.Y. Oct. 25, 1996) (late rescission refused); *Arnold v. Waterfield Mortgage Co.*, 966 F. Supp. 387 (D. Md. 1996) (late rescission refused), *aff'd*, 116 F.3d 472 (4th Cir. 1997); *In re Fidler*, 210 B.R. 411 (Bankr. D. Mass. 1997) (late rescission permitted); *In re Botelho*, 195 B.R. 558 (1996; late rescission permitted); *In re Hall*, 188 B.R. 476 (Bankr. D. Mass. 1995) (late rescission refused); *In re Shaw*, 178 B.R. 380 (Bankr. D.N.J. 1994) (late rescission permitted); *In re Cox*, 162 B.R. 191 (1993; late rescission refused); *First Trust National Association v. Chiang*, 662 N.Y.S.2d 136 (App. Div. 1997) (mem.) (late rescission permitted); *Citizens Federal Bank, F.S.B. v. Brickler*, 683 N.E.2d 358 (Ohio App. 1996) (late rescission refused); *Westbank v. Maurer*, 658 N.E.2d 1381 (Ill. App. Ct. 1995) (late rescission permitted), *appeal denied*, 664 N.E.2d 648 (Ill. 1996).

grants a right likely to be misused. In the *Tucker* case, the borrower obtained a loan in early 1988 in the amount of $105,000, but subsequently was chronically late on payments, missed many months, and was in and out of bankruptcy three times.[20] In 1995, he approached a "mortgage counselor" for assistance. Upon review of the loan documents, the counselor opined that TILA "had been broken" in his case, told him that he had a right to rescind the loan under certain circumstances, and advised him to stop paying on the loan, which he did. She referred him to a Boston attorney who, after the lender initiated foreclosure, purported to rescind the loan on the borrower's behalf. Rather than being able to foreclose on a defaulted borrower, the lender ended up in the federal courthouse.

While a number of suits and counterclaims attempting late rescissions have been filed, *amici* are fearful of many more to come. The acceleration of case authority and attention apparently reflects the reality that this issue has just recently moved to the forefront. It is the nature of our adversary system that decisions favoring untimely rescissions are already being used to defeat or hold up legitimate foreclosures on mortgages that were presumed enforceable for many years. Indeed, *amici* who appear here in support of Petitioners are some of the consumer advocates who have used, or supported the use of, this strategy for their clients. *See* AARP's Br., at 14, n.32; Botelho's Brief, at 2; Keest and Klein, *Truth in Lending* § 1.1.2 at 33.[21]

[20] The deposition of plaintiff Donald Keith Tucker, from which these facts are drawn, is on file at the United States District Court for the District of Massachusetts. Deposition of Donald Keith Tucker (Feb. 21, 1997), filed in *Signet v. Tucker*, March 5, 1997.

[21] For example, a Massachusetts legal education seminar recently invited attorneys to learn "How to require a lender to credit all payments made on a mortgage to reduction of principal, effectively turning a traditional interest-bearing promissory note into an interest-free loan," and "How to raise federal Truth-in-Lending Act violations as defenses to a foreclosure action, even though the statute of limitations for bringing such actions has expired." *Consumer Finance Regulation*, advertising Jan. 28, 1997 Massachusetts Continuing Legal Education Seminar.

Moreover, these cases can be difficult to defend; not only can documents occasionally get lost in the blizzard of paperwork created by the millions of mortgage loans extended every year, but the underlying facts essential to determining the existence of a TILA violation become difficult to uncover over time. *See* n.14, *supra*. The consequence of numerous individual cases, each prosecuted separately, would have a significant impact on the lending industry as a whole.

Petitioners' *amici* try to divert attention from the inequity of permitting rescission in recoupment by asserting that rescission rights ought to be eternally available in order to protect borrowers from those in the lending industry whom *amici* believe to be unethical. AARP's Br., at 27-29.[22] This argument is based on the faulty assump-

[22] There is no merit in the speculation of Petitioners' *amici*, and of some courts, that lenders act in bad faith and abuse the right to foreclose, waiting until after the three-year deadline so as to avoid a rescission. AARP's Br., at 13; *Botelho*, 195 B.R. at 566; *Dawe v. Merchants & Trust Corp.*, 683 P.2d 796, 801 (Colo. 1984). The realities of modern mortgage banking make such abuse highly unlikely. Many mortgages are now "serviced" (*i.e.*, payments collected, records kept, escrow accounts managed) under contracts or federal guidelines that, within a range of some discretion, generally provide that foreclosure proceedings must be started within 3-9 months of default. *See Freddie Mac Single Family Seller/Servicer Guide*, Ch. 66.9; *Fannie Mae Servicing Guide*, Part VIII, § 102; Federal Housing Administration, *Administration of Insured Home Mortgages*, Directive No: 4330.1, ch. 7.12(D). *See also Beach v. Great Western*, 670 So.2d at 990 ("[m]odern banking regulations make [the prospect of lenders waiting out the three-year period and then foreclosing] highly unlikely.") Other significant forces at work create pressure on lenders and servicers not to sit on their rights. Loans in default adversely affect lenders' balance sheets. Regulatory agencies concerned with the safety and soundness of financial institutions monitor for such losses. Moreover, the interest lost on sums tied up in a delinquent mortgage loan is incentive enough for any lender or servicer to foreclose in a reasonable time after default.

tion that TILA rescission is a borrower's only remedy in such an instance. As noted, if the borrower has suffered actual damage from the TILA violation, the statute permits an otherwise untimely claim to recover that loss if the lender sues to collect. 15 U.S.C. § 1640(e). Borrowers have a panoply of other common law and statutory rights and remedies, too numerous to catalog, that they can and do raise in suits with those whose money they borrowed. Legal advocacy organizations, including Petitioners' *amici*, are active in the courts and in the halls of legislatures advocating for those borrowers. If Congress has not addressed those perceived problems sufficiently, it hardly is the province of the courts to upset the legislative decision contained in 15 U.S.C. § 1635(f) by creating equitable exceptions to the stated expiration date in the law.

IV. A STRONG CONGRESSIONAL POLICY OF FOSTERING A STABLE AND HEALTHY SECONDARY MORTGAGE MARKET IS FURTHERED BY AFFIRMING THE LOWER COURT'S RULING.

The decision of the Florida Supreme Court is consistent with the strong express Congressional policy in favor of encouraging the national secondary mortgage market. Permitting consumers to raise rescission claims at any time, on the other hand, would undermine the economic certainty and stability that are essential to the efficient functioning of an orderly national mortgage market.

The most important development in mortgage finance since World War II has been the creation of a national financial market where mortgage loans are sold by lenders after the loans have been made. This phenomenon is often referred to as the "secondary mortgage market." The secondary mortgage market has enabled lenders to sell mortgages almost immediately, replenishing the lenders' funds and thereby enhancing liquidity. The most prominent of the secondary mortgage market investors are two government-sponsored enterprises, *amici* Freddie Mac and Fannie Mae.

Congress, in chartering *amici* Freddie Mac and Fannie Mae and in several other enactments, has consistently pursued a strong policy of encouraging the secondary market. *See, e.g.*, 12 U.S.C. § 1716 (Fannie Mae); 12 U.S.C. § 1451, note (Freddie Mac); Secondary Mortgage Market Enhancement Act of 1984, Pub. L. 98-440, 98 Stat. 1689 (1984). Only two years ago, Congress enacted the 1995 TILA Amendments with the stated intention of increasing protections for the secondary market from substantial losses resulting from rescissions for certain technical TILA violations. 141 Cong. Rec. H9515 (Sept. 27, 1995) (Statement of Rep. Roukema); 141 Cong. Rec. S14566-14567 (Sept. 28, 1995) (Statement of Sen. D'Amato). As a result of these and other public and private initiatives, about half of all mortgage loans originated today are sold on the secondary market. *Inside Mortgage Finance*, at 9 (Apr. 19, 1996).

As purchasers of mortgage loans, these federally-chartered enterprises are a source of private capital for lenders, increasing lenders' ability to make additional loans available to other homeowners. In turn, Fannie Mae and Freddie Mac retain some loans in portfolio, and group, or pool, others in mortgage-backed securiites for sale to investors or for swaps with lenders. Many banks, mortgage companies, and other investors also buy and sell mortgages for their own portfolios and for formation of mortgage-backed securities.

These secondary market mechanisms provide the source of funds for billions of dollars of mortgage loans to consumers annually. This phenomenon has achieved a tremendous increase in the availability of mortgage capital nationwide by greatly enhancing the liquidity of lenders. The resulting increase in the flow of capital has reduced the cost of both financing home purchases and, generally, of home ownership in the United States by billions of dollars each year. Kenneth G. Lore, *Mortgage-Backed Securities* at 1-2 (1996 ed.) (secondary market saves borrowers more than $2 billion each year due to cheaper

mortgages). It also has been an integral part of achieving the oft-repeated Congressional goals of encouraging and supporting home ownership and of providing full access to home mortgage loans. *See, e.g.*, 12 U.S.C. § 1709 (FHA mortgage insurance program); 12 U.S.C. § 1464 (savings and loan charters issued "to provide . . . for the extension of credit for homes").

One of the crucial assumptions on which trillions of dollars of loans are bought and sold on the secondary market is that those loans are valid and enforceable. With respect to TILA, market participants understand that certain loans potentially are rescindable, but only for three years. Reopening these loans to rescission claims—and litigation, such as this and other cases—would be inconsistent with the decision by Congress to encourage a stable secondary mortgage market for loans.

The classic goals of finality and peace that are served by statutory deadlines are particularly important to secondary market participants. *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) (deadlines prevent suits that "upset settled expectations"). Mortgage holders and other secondary market participants that have guaranteed the performance of mortgages would bear the initial risk of loss from a new interpretation of the statute that recognizes open-ended rescission liability. That loss may be passed back to those that sold the loans, typically with representations and warranties that the mortgages are enforceable, to such participants.[23] However, wherever the loss

[23] Although loans are usually sold subject to indemnification rights for breach of representations and warranties, the secondary market's system of indemnity rights may not work smoothly many years after the loan has closed. Companies go out of business, and contract documents are inadvertently lost or destroyed. Moreover, with such large exposure from late rescissions, potential indemnitors are more likely to litigate. For example, the *Tucker* case discussed *supra* at 23-24 led to litigation between the loan servicer and a prior assignor of the loan as to which assignee would pay the

ultimately falls, Congressional encouragement of a stable and secure secondary market is frustrated, rather than fostered, by open-ended rescission.

CONCLUSION

For the reasons that *Beach* was correctly decided under 15 U.S.C. § 1635(f), and that reversal would be inequitable because of many negative effects on lenders, borrowers and secondary mortgage market participants, undersigned *amici curiae* urge affirmance of the decision below.

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defense costs of the *Tucker* suit and any ultimate loss. *Signet Mortgage Corp. v. Huntington Mortgage Co.*, No. 96-418 (E.D. Va.). The result of any reversal of *Beach* is likely to be financial uncertainty for each entity that now owns or has ever owned an affected loan.